

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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J. H. JONAS, Doing Business Under the Firm  
Name of J. H. JONAS AND SONS, JACOB  
H. JONAS, MAX I. JONAS, DAVID A.  
JONAS, and HARRY J. MALERSTEIN,  
Appellants,

vs.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,  
Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

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F. D. MONTGOMERY  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

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Messrs. FRANK L. A. GRAHAM and FORD  
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fornia.

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In the United States District Court, Southern Dis-  
trict of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

CITATION.

United States of America,  
Ninth Judicial Circuit,—ss.

To August Roberti, Jr., and Edward L. Roberti,  
GREETING:

You and each of you are hereby cited and ad-

monished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit, on the 12th day of July, 1924, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, Ninth Judicial Circuit, in that certain suit in Equity No. G-79, wherein you and each of you are plaintiffs and appellees, and J. H. Jonas, Jacob J. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein are defendants and appellants, to show cause, if any there be, why the order or decree entered in this cause in the District Court on the 3d day of June, 1924, against appellants, and mentioned in said appeal, should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM P. JAMES, United States District Judge of the Southern District of California, Ninth Judicial Circuit, this 9th day of July, 1924.

WM. P. JAMES,  
U. S. District Judge, S. D. C. S. D.

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr. et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Filed Jul. 10, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk.

*August Roberti, Jr. and Edward L. Roberti.* 3

Received copy of the within citation this 10th day of July, 1924.

F. L. GRAHAM,  
FORD W. HARRIS,  
Attorneys for Appellee.

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In the United States District Court, Southern District of California, Southern Division.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,  
Defendants.

BILL OF COMPLAINT FOR INFRINGEMENT OF LETTERS PATENT No. 1,180,432.

Now come the plaintiffs in the above-entitled suit and complaining of the defendants above-named allege:

I.

That August Roberti, Jr., and Edward L. Roberti are residents of the county of Los Angeles, State of California, and citizens of said state.

II.

That defendants Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein are resi-

dents of the county of Los Angeles, State of California and citizens of said State; that J. H. Jonas is doing business under the fictitious names of J. H. Jonas & Sons in the County of Los Angeles, State of California.

### III.

That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

### IV.

That theretofore, to wit, on and prior to February 18th, 1915, August Roberti, Jr., and Edward L. Roberti were the original, first and joint inventors of a certain new and useful invention, to wit, [1\*] a Non-stretching, Ventilated Mattress, which had not been known or used by others in this country before their invention thereof, nor patented nor described in any printed publication in this or any foreign country before their said invention thereof, or more than two years prior to their application for a patent, nor was the same in public use or on sale in this country for more than two years prior to their application for a patent in this country and being such inventors, heretofore, to wit, on February 18th, 1915, said August Roberti, Jr., and Edward L. Roberti filed an application in the Patent Office of the United States praying for the issuance to them of letters patent for said new and useful invention.

### V.

That thereafter, to wit, on April 25th, 1916, let-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

ters patent of the United States for the said invention dated on said last-named day and numbered 1,180,432, were issued and delivered by the Government of the United States to the said August Roberti, Jr., and Edward L. Roberti, whereby there was granted to August Roberti Jr., and Edward L. Roberti, their heirs, legal representatives and assigns, for the full term of seventeen years from April 25th, 1916, the sole and exclusive right to make, use and vend said invention throughout the United States of America and the territories thereof, and a more particular description of the invention patented in and by said letters patent will more fully appear from the letters patent ready in court to be produced by the plaintiffs.

#### VI.

That plaintiffs ever since the issuance of said letters patent have been and now are the *sold* holders and owners of said letters patent and all rights and privileges by them granted, and have under the firm name of Roberti Bros., constructed, made, used and sold mattresses containing and embracing and capable of carrying out the invention patented by the said letters patent [2] and upon each of said mattresses have stamped and printed the day and date of and the number of said letters patent and the same have gone into general use.

#### VII.

That the plaintiffs herein entered into the business of making mattresses in the year 1902 in the City of Los Angeles, State of California, and have built up a high reputation with the public due to

the excellence of the product manufactured and sold by them, which reputation has since been maintained; that plaintiffs introduced to the public the mattress embodying the invention set forth in letters patent numbered 1,180,432 aforesaid and have adopted and used since June 1st, 1915, upon all such mattresses made and sold by them the name "SANOTUF" and upon a certain grade of such mattresses have adopted and used since the year 1903 the word "RESTMORE"; that plaintiffs have expended large sums of money in advertising said mattresses under such names; that such names and designations have become in the minds of the trade and public generally, associated with and designative of the mattresses made and sold by plaintiffs.

#### VIII.

That defendants, well knowing the rights of plaintiffs herein, as your plaintiffs are informed and believe, did on or about the 1st of January, 1923, adopt and use upon mattresses made and sold by them, and containing the inventions covered by said letters patent numbered 1,180,432, the words "TIED-NOTUFT" and "RESTAMORE" with the intent and purpose of deceiving the public and trade into the belief that the mattresses made and sold by defendants, and so marked, were in fact mattresses made and sold by plaintiffs.

#### IX.

That by reason of the fact that defendants have so marked their mattresses as set forth in paragraph VIII there is constant confusion in the minds of the public, due to the adoption and [3] use by the

defendants of the names aforesaid, and the business and goods of the defendants have been confused with the business and goods of plaintiffs.

X.

That all of the aforesaid acts of defendants set forth in Paragraphs VIII and IX herein have been done with full knowledge of the rights of plaintiffs in and to the names "SANOTUF" and "REST-MORE" and all such acts have been done without any commercial necessity therefor and with the fraudulent, unfair and unlawful intent and purpose of creating in the minds of the public the idea that the mattresses made and sold by defendants are in fact the goods of plaintiffs.

XI.

That plaintiffs are informed and believe and therefore allege that the defendants threaten and intend to continue their unlawful acts and thus cause plaintiffs irreparable damage for which plaintiffs have no plain, speedy or adequate remedy at law.

XII.

That, by reason of the premises and the fraudulent, unfair and unlawful acts of the defendants as aforesaid, plaintiffs have been and are prejudiced and injured in their business and will be seriously and irreparably injured unless each of the defendants are restrained and enjoined from the aforesaid unlawful acts. That the reputation of plaintiffs' business has been and is in danger and its sale of mattresses by reason of defendants' act has been and will be seriously reduced. That plaintiffs have

already sustained great loss and damage, the amount thereof cannot be stated with accuracy by reason, among other things, of ignorance as to the number of mattresses which have been sold by defendants under the names "TIEDNOTUFT" and "REST-AMORE" aforesaid.

### XIII.

That at divers times within six years last past in the Southern District of California, the defendants herein, J. H. [4] Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, without the license or consent of the plaintiffs have used the mattresses described, claimed and patented and have made and sold the mattresses described, claimed and patented in and by the said letters patent No. 1,180,432, and have infringed upon said letters patent and each and all claims thereof, and intend and threaten to continue so to do.

### XIV.

That by reason of the infringement aforesaid, plaintiffs have suffered damages and plaintiffs are informed and believe that the defendants have realized profits but the exact amount of such profits and damages is not known to plaintiffs.

### XV.

That plaintiffs have requested the defendants to desist and refrain from further infringement of said letters patent and to account to the plaintiffs for the aforesaid profits and damages but the defendants have failed and refused to comply with



such request or any part thereof, and are now continuing and carrying on the said infringement upon said letters patent daily and threaten to continue the same and unless restrained by this Court will continue the same, whereby plaintiffs will suffer great and irreparable injury and damage for which plaintiffs have no plain, speedy, or adequate remedy at law.

WHEREBY, plaintiffs pray as follows:

I.

That a final decree be entered in favor of the plaintiffs, August Roberti, Jr., and Edward L. Roberti, and against the defendants J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, perpetually enjoining and restraining the said defendants, their agents, servants, attorneys, workmen and employees, and each of them, from using the mattresses described, claimed and patented in and by said letters patent No. 1,180,432, [5] and from making using or selling the mattresses described, claimed or patented in and by the said letters patent and from infringing upon said letters patent or any of the claims thereof, either directly or indirectly or from contributing to any such infringement.

II.

That upon the filing of this bill of complaint or later on motion, a preliminary injunction be granted to the plaintiffs enjoining and restraining the defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas,

Max I. Jonas, David A. Jonas and Harry J. Malerstein, their agents, servants, attorneys, workmen and employees, and each of them, until the further order of this Court, from using the mattresses described, claimed and patented in and by said letters patent No. 1,189,432, and from making, using or selling the mattresses described, claimed and patented by said letters patent and from infringing upon said letters patent or any of the claims thereof either directly or indirectly, or from contributing to any such infringement.

### III.

That plaintiffs have and recover from the defendants the profits realized by the defendants herein and the damages suffered by the plaintiffs and by reason of the infringement aforesaid, together with the costs of suit and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

### IV.

That, in addition to the profits to be accounted for as aforesaid, plaintiffs have and recover from the defendants, and each of them, the damages suffered by the plaintiffs and by reason of the unfair competition aforesaid.

### V.

That the defendants, J. H. Jonas, doing business under the [6] firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, *David A.* and Harry J. Malerstein, their agents, servants, attorneys, workmen, and employees, and each of them, be perpetually enjoined and restrained from using the

*August Roberti, Jr. and Edward L. Roberti.* 11  
names "TIEDNOTUFT" and "RESTAMORE"  
upon mattresses made or sold by them or in any way  
or manner marking mattresses as to deceive the  
public into believing the mattresses made and sold  
by defendants are the mattresses made and sold by  
plaintiffs.

Answer under oath is hereby expressly waived.

AUGUST ROBERTI, Jr.,  
EDWARD L. ROBERTI,  
Plaintiffs.

FRANK L. A. GRAHAM,  
FORD W. HARRIS,

Solicitors and Counsel for Plaintiffs. [7]

State of California,  
County of Los Angeles,—ss.

August Roberti, Jr., and Edward L. Roberti, be-  
ing duly sworn, each for himself, deposes and says  
that he has read the foregoing complaint and knows  
the contents thereof; that the same is true of his  
own knowledge except as to matters therein stated  
on information and belief and as to those matters,  
he believes it to be true.

AUGUST ROBERTI, Jr.  
EDWARD L. ROBERTI.

Subscribed and sworn to before me, this 5th day  
of March, 1923.

[Seal] VIRGINIA A. ARCHER,  
Notary Public in and for the County of Los An-  
geles, State of California.

[Endorsed]: Original. No. G-79—Eq. United  
States District Court, Southern District of Cali-

fornia, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiff, vs. J. H. Jonas, etc., Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, Defendants. In Equity. Bill of Complaint for Infringement of Letters Patent No. 1,180,432. Filed Mar. 7, 1923. Chas N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [8]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ANSWER.

Come now the defendants above named, and each for himself and not one for the other, make answer to plaintiffs' bill of complaint herein, and deny and allege as follows:

I.

Each defendant has no knowledge, except by said complaint as to the residence of August Roberti, Jr., and Edward L. Roberti or that they are citizens of the State of California.

II.

Each defendant Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein admit that they are residents of the county of Los Angeles, State of California, and citizens of said State; J. H. Jonas admits that he is doing business under the fictitious name of J. H. Jonas & Sons in the county of Los Angeles, State of California.

III.

Deny that the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

IV.

Deny that on or prior to February 18, 1915, or at any other time, August Roberti, Jr., or Edward L. Roberti were the original, first or joint inventors of any new or useful invention or any invention at all, for Non-stretching, Ventilated Mattress which [9] had not been known and (or) used by others in this country before their invention thereof and deny that the same was not patented and described in any printed publication in this or any foreign country prior to the alleged invention thereof, and more than two years prior to their application for any alleged patent thereon, deny that same was not in public use and on sale in this country for more than two years prior to any alleged application for a patent in this county, deny that heretofore, to wit, on February 18, 1915, or at any other time, said August Roberti, Jr., or Edward L. Roberti filed any application in the Patent Office of the United States for the issuance to them of any let-

ters patent for any alleged new or useful invention, and each defendant requires strict proof therof.

## V.

Deny that on April 25, 1916, or at any time or at all, any alleged letters patent of the United States for the said invention dated on said last-named day or any day, or numbered 1,180,432 were issued or delivered by the Government of the United States to said August Roberti, Jr., or Edward L. Roberti, whereby there was granted to August Roberti, Jr., or Edward L. Roberti, their heirs, legal representatives or assigns, or any person at all, for the full term of seventeen years from April 25, 1916, or for any term, the sole or exclusive right, or any right, to make, use or vend said alleged invention throughout the United States of America and the Territories thereof, or that a more particular description or any description at all of any alleged invention patented in or by said alleged letters patent will more fully appear from the alleged letters patent alleged to be ready in court to be produced by the plaintiffs; and allege that said letters patent are void and of no effect.

## VI.

Deny that the plaintiffs ever since the issuance of said purported letters patent have been or now are the sole or any holders or owners of any purported letters patent or all [10] rights or privileges by them alleged to be granted, or have under the firm name of Roberti Bros. or any other name constructed, or made, or used, or sold any alleged mattresses containing or embracing or capable of

carrying out the alleged invention alleged to be patented by the alleged letters patent or upon each of said alleged mattresses have stamped or printed the day or date of or the number of said alleged letters patent, or the same have gone into general use; and each defendant requires strict proof of the matters herein contained.

## VII.

Deny that plaintiffs herein entered into the business of making mattresses in the year 1902 in the city of Los Angeles, State of California, or have built up a high reputation with the public due to the excellence of the product alleged to be manufactured or sold by them, which alleged reputation has since been maintained; deny that plaintiffs introduced to the public the alleged mattress embodying the alleged invention set forth in letters patent No. 1,180,432, or have adopted or used since June 1st, 1915, or at any other time, upon all such purported mattresses made or sold by them the name "SANOTUF" or upon a certain grade of such alleged mattresses have adopted or used since the year 1903 the word "RESTMORE"; deny that plaintiffs have expended large sums or any sums at all of money in advertising said alleged mattresses under such alleged names; deny that such alleged names or alleged designations have become, in the minds of the trade or public generally, associated with or designative of the alleged mattresses made or sold by plaintiffs; and on the contrary allege that the plaintiffs have no right to the exclusive use of the word "RESTMORE," as the

same has been in general use throughout this country long prior to the alleged use by the plaintiffs, by the following firms and others whom these defendants pray leave of this Court to insert by amended answer when ascertained: [11]

Alabama Broom & Mattress Company, Huntsville, Alabama;

Restmore Manufacturing Co., Vancouver, B. C.;  
Wichita Mattress Co., Wichita, Kansas.

#### VIII.

Deny that defendants, well knowing the purported rights of plaintiffs herein, as your plaintiffs are informed and believe, did on or about the 1st of January, 1923, or at any other time, adopt or use upon mattresses made or sold by them, or containing the inventions covered by said alleged letters patent numbered 1,180,432, the words "TIED-NOTUFT" or "RESTAMORE" with the intent or purpose of deceiving the public trade into the belief that the mattresses made or sold by defendants, or so marked, were in fact mattresses made or sold by plaintiffs.

#### IX.

Deny that by reason of the fact that defendants have so marked their alleged mattresses as set forth in paragraph VIII there is constant confusion in the minds of the public, due to the adoption or use by the defendant of the alleged names aforesaid, or the business or goods of the defendants have been confused with the alleged business or alleged goods of plaintiffs.



X.

Deny that all of the alleged aforesaid acts of defendants alleged to be set forth in paragraphs VIII or IX herein have been done with full or any knowledge of the alleged rights of plaintiffs in or to the names "SANOTUF" or "RESTMORE" or all such alleged acts have been done without any commercial necessity therefor or with fraudulent, unfair or unlawful intent or purpose of creating in the minds of the public the idea that the alleged mattresses alleged to be made or alleged to be sold by defendants are in fact the alleged goods of plaintiffs.

XI.

Deny that the defendants threaten or intend to continue their alleged unlawful acts or that any unlawful acts have in fact been [12] committed or thus cause plaintiffs irreparable damage or any damage at all, for which plaintiffs have no plain, speedy and adequate remedy at law, and on the contrary the defendants allege that if the plaintiffs have any alleged cause of action as against each defendant that there is an adequate remedy at law.

XII.

Deny that by reason of the premises or the fraudulent, unfair or unlawful acts or any acts, of the defendants as aforesaid, plaintiffs have been or are prejudiced in their alleged business or will be seriously or irreparably injured unless each of the defendants are restrained or enjoined from the aforesaid unlawful acts; deny that the reputation of plaintiffs' alleged business has been or is

in danger or its sale of alleged mattresses by reason of defendants' acts has been or will be seriously reduced. Deny that the plaintiffs have already sustained great loss or damage or any loss or damage or at all, the amount thereof cannot be stated with accuracy by reason, among other things, of ignorance as to the number of alleged mattresses which have been alleged to be sold by defendants under the names "TIEDNOTUFT" or "RESTA-MORE" aforesaid.

### XIII.

Deny that at diverse times within six years last past, or at any other time, in the Southern District of California, or at any other place, the defendants herein, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, or Jacob H. Jonas, or Max I. Jonas, or David A. Jonas or Harry J. Malerstein without the license and consent of the plaintiffs have used the alleged mattresses alleged to be described, or claimed or patented or have made or sold the alleged mattresses alleged to be described or claimed or patented in or by the said alleged letters patent No. 1,180,432 or have infringed upon said letters patent or each or all the alleged claims thereof or intend or threaten to continue so to do. [13]

### XIV.

Deny that by reason of the alleged infringement aforesaid, plaintiffs have suffered damages, or plaintiffs are informed or believe that the defendants have realized profits or that the exact amount,

if any, of such alleged profits or damages, is not known to plaintiffs.

XV.

Deny that plaintiffs have requested defendants to desist or refrain from further infringement of said alleged letters patent or to account to the plaintiffs for the aforesaid alleged profits or damages and deny that the defendants have failed or refused to comply with such request and any part thereof, or are now continuing or carrying on the said infringement upon said letters patent daily or threaten to continue the same or unless restrained by the Court will continue the same, and deny that plaintiffs will suffer great or irreparable injury or damage or any injury or damage at all for which plaintiffs have no plain, or speedy and adequate remedy at law.

XVI.

Further answering each of these defendants avers and alleges that the pretended improvement in mattresses mentioned in said letters patent No. 1,180,432 was not new when produced by said August Roberti, Jr., and Edward L. Roberti, but was known and previously patented, and was previously described in the United States in printed publications prior to the alleged invention thereof by the said August Roberti, Jr., and Edward L. Roberti, that is to say: the said improvements were patented previously in and by the following letters patent of the United States: [14]

Name	Number of Patent	Date
Maas,	121,723	Dec. 12, 1871
Heath,	274,495	Mar. 27, 1883
Ashby,	454,445	June 23, 1891
Micon,	1,123,345	Jan. 5, 1915
Lane,	622,239	April 4, 1899
Curlin,	691,118	Jan. 14, 1902

and such other publications not at present known by the defendants, and which defendants beg leave of this Court to set forth by amended answer when ascertained.

#### XVII.

Further answering, each defendant is informed and believes, and therefore alleges, that United States letters patent No. 1,180,432, dated April 25, 1916, were not the joint invention of August Roberti, Jr., or Edward L. Roberti.

#### XVIII.

Further answering, each defendant is informed and believes, and therefore alleges and avers that August Roberti, Jr., and Edward L. Roberti surreptitiously or unjustly obtained the patent for mattresses set forth in United States letters patent No. 1,180,432, of April 25, 1916, for that which was in fact the invention of another, to wit, Joseph Avril whose present address is unknown, but which defendants beg leave of this Court to insert by amended answer when ascertained, which Joseph Avril was using reasonable diligence in adopting and perfecting the same prior to the alleged invention of August Roberti, Jr., and Edward L.

Roberti and prior to the date of application of said letters patent No. 1,180,432.

XIX.

Further answering, each defendant avers and alleges that this suit is mere sham and pretense and a desire on the part of plaintiffs to embarrass the defendants and injure their business without just cause, and that there is no foundation in theory or fact for the alleged infringing acts complained of or for the [15] alleged unfair competitive acts complained of.

XX.

Further answering, each defendant avers and alleges that they have manufactured mattresses but that said mattresses are not an infringement of any purported letters patent granted to August Roberti, Jr., or Edward L. Roberti, and admit that they have placed the word "TIEDNOTUFT" on said mattresses, and allege that the word "TIED-NOTUFT" is their property right and that the plaintiffs have no right to the same.

XXI.

Further answering, these defendants aver and allege that the Court is without jurisdiction of these defendants or of the subject matter of the suit.

XXII.

As a separate and further defense each defendant alleges and avers that such mattresses as they have manufactured have been manufactured under and substantially in accordance with letters patent of the United States No. 1,421,274, to H. J. Malerstein, dated June 27, 1922.

WHEREFORE, each defendant prays that plaintiffs' bill of complaint herein be dismissed with costs against plaintiffs to be taxed.

JACOB H. JONAS.

MAX I. JONAS.

DAVID A. JONAS.

HARRY J. MALERSTEIN.

By J. CALVIN BROWN,

Their Solicitor.

CHANNING FOLLETTE,  
RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors for Defendants. [16]

[Endorsed]: Original. In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al. Filed Apr. 19, 1923. Chas. N. Williams, Clerk. By W. J. Tufts, Deputy Clerk. Answer. Received copy of the within answer this 19th day of April, 1923. Frank L. A. Graham, Attorney for Plaintiffs. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [17]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PLAINTIFFS' INTERROGATORIES PURSUANT TO EQUITY RULE 58.

Pursuant to Equity Rule 58, J. H. Jonas, one of the defendants in the above-entitled cause, is required to answer the following interrogatories for the discovery of facts material to the support or defense of this cause, and to make such answers in writing, under oath, duly signed:

I.

Are you the J. H. Jonas doing business under the firm name of J. H. Jonas & Sons?

II.

If your answer to Question I is in the affirmative, state the names of all persons having an interest in the business of the firm so named.

III.

If your answer to Question I is in the affirmative, state the name of the person who directs the affairs of the firm so named.

## IV.

State the connection of each person, named in your answer to Question II, with J. H. Jonas & Sons and the nature of their duties on behalf of J. H. Jonas & Sons. [18]

## V.

Has the firm of J. H. Jonas & Sons any agreement relating to the business of J. H. Jonas & Sons, either oral or in writing, with any of the persons named as defendants in the above-entitled cause of action?

## VI.

If your answer to Question V is in the affirmative, state the nature of any and all such agreements.

## VII.

Were you associated in business with a Mr. Murdock in a company named Murdock & Jonas, Inc.?

## VIII.

If your answer to Question VII is in the affirmative, was H. J. Malerstein employed by Murdock & Jonas, Inc.?

## IX.

If your answer to Question VIII is in the affirmative, was it not during such employment that H. J. Malerstein first showed you a mattress constructed in accordance with the mattress shown in the Malerstein patent No. 1,421,274?

## X.

Is it not a common practice for mattress makers to have used mattresses turned in, which are taken



apart either for the purpose of re-making or for salvaging parts of such mattresses?

XI.

Of your own knowledge, has H. J. Malerstein examined the construction of any other mattresses than those made by J. H. Jonas & Sons or Murdock & Jonas, Inc.?

XII.

Did you and H. J. Malerstein examine the construction of a Sanotuf mattress made by plaintiffs and discuss the construction of the same?  
[19]

XIII.

Did you not state to H. J. Malerstein that the mattress shown in his patent No. 1,421,274 is an infringement of the patent in suit No. 1,180,432?

XIV.

Is the firm of J. H. Jonas & Sons making or selling mattresses constructed in accordance with the mattress shown and described in the Malerstein patent No. 1,421,274?

XV.

If within your knowledge at the present time, please state the present address of Joseph Avril.

XVI.

State when Joseph Avril made the alleged invention referred to in Paragraph XVIII of your answer in the above-entitled cause of action, giving the month and year.

XVII.

State the name of the City and State where Joseph Avril made the alleged invention referred

to in Paragraph XVIII of your answer in the above-entitled cause of action.

## XVIII.

State the month and year when Joseph Avril first made a mattress or portion of a mattress embodying the alleged invention referred to in Paragraph XVIII of your answer in the above-entitled cause of action.

## XIX.

When did the firm of J. H. Jonas & Sons first use the word "Restamore" on mattresses?

## XX.

Did you not know at the time J. H. Jonas & Sons first used the word "Restamore" on mattresses, that plaintiffs in this case had prior to such time been using the word "Restmore" on mattresses? [20]

## XXI.

Do you know of the use of the words "Restmore" or "Restamore" by any other mattress maker in Southern California, that is California south of the Tehachipi Mountains?

## XXII.

If your answer to Question XXI is in the affirmative, state the names of any such persons, firms or corporations.

## XXIII.

Have you seen taken apart any Sanotuf mattresses made by plaintiffs?

## XXIV.

If your answer to Question XXIII is in the

*August Roberti, Jr. and Edward L. Roberti.* 27

affirmative, state when you first saw the interior construction of such mattress.

XXV.

Is J. H. Jonas & Sons using the words "Tien-notuft" or "Restamore" on mattresses at the present time?

XXVI.

To your knowledge, did H. J. Malerstein see, prior to October 31, 1921, the interior construction of a Sanotuf mattress made by plaintiffs?

XXVII.

Is H. J. Malerstein a partner in the business of J. H. Jonas & Sons?

J. H. Jonas is required to answer each of the above interrogatories in the manner and form as stated above.

FRANK L. A. GRAHAM,  
FORD W. HARRIS,  
Attorneys for Plaintiffs.

Los Angeles, California, May 10, 1923. [21]

[Endorsed]: Original. No. G-79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Plaintiffs' Interrogatories. Filed May 10, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [22]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ANSWERS TO PLAINTIFFS' INTERROGATORIES.

Comes now the defendant J. H. Jonas and answers plaintiffs' interrogatories to the best of his knowledge and belief, as follows:

I. Yes.

II. None.

III. I do.

IV. None.

V. As I understand the question, you refer to any agreement that I may have with H. J. Malerstein. I have an oral understanding with Malerstein.

VI. Said understanding relates to the manufacture of mattresses.

VII. Yes.

VIII. Yes.

IX. I do not know.

X. I am not prepared to state, not knowing.

XI. I have no knowledge.

XII. No. [23]

XIII. I do not remember.

XIV. Yes.

XV. Not prepared to state, not knowing.

XVI. Not prepared to state, not knowing.

XVII. Not prepared to state, not knowing.

XVIII. Not prepared to state, not knowing.

XIX. The word "Restamore" has never been used on any mattresses manufactured by us and sold by us, the said work only appearing in our price list; in 1917 mattresses were made to the order of a Northern firm who supplied labels to be attached to such mattresses, which labels bore the name of the Northern firm and the word "Restamore." Other than this the word has never been used on mattresses of our manufacture. We have labels with the word "Restamore" but to my knowledge have never used them.

XX. Never used it.

XXI. Not prepared to state, not knowing.

XXII. Not prepared to state, not knowing.

XXIII. No.

XXIV. No.

XXV. I am using the word "Tiednotuft" on mattresses manufactured by me, but the word "Restamore" has never appeared except as stated in answer to interrogatory XIX.

XXVI. Not prepared to state, not knowing.

XXVII. No.

J. H. JONAS.

Subscribed and sworn to before me this 18th day of May, 1923.

[Seal]

J. CALVIN BROWN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 27, 1925. [24]

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Answers to Plaintiffs' Interrogatories. Filed May 19, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [25]

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At a stated term, to wit, the July Term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 1st day of October, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WM. P. JAMES, District Judge.

No. G-79—EQUITY.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—OCTOBER 1, 1923—  
ORDER GRANTING MOTION TO AMEND  
ANSWER, ETC.

This cause coming on at this time for hearing on motion of defendants to amend answer and for setting for trial; Frank L. A. Graham, Esq., appearing as counsel for the plaintiff, and Calvin Brown, Esq., appearing as counsel for the defendants, it is by the Court ordered that defendants be permitted to amend their answer on condition that the costs of taking depositions, and reporter's fees, a copy for plaintiff and defendant, be paid by the defendant; and it is further ordered by the Court that this cause be set for trial for December 20th, 1923. [26]

In the United States District Court, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE OF AMENDMENT TO ANSWER OF  
DEFENDANTS.

To Plaintiffs, August Roberti, Jr., and Edward L.  
Roberti, and Their Solicitors and Counsel,  
Frank L. Graham and Ford W. Harris, Esqrs.:

Please take notice that on Monday, October 1,  
1923, at the hour of ten o'clock A. M., in the court-  
room *if* the Honorable Benjamin F. Bledsoe, in  
the Federal Building, Los Angeles, California, or  
before such other Judge or at such other time as  
may be appointed, defendants and each of same  
by their solicitors, will move this Honorable Court  
for an order permitting defendants to amend their  
answer, all in accordance with Federal Equity Rules  
19 and 34, the attached amendment to answer of  
defendants, and supported by affidavit of J. Calvin  
Brown. This motion is based further upon the  
files, records, papers and proceedings in this cause  
and on the file herein.



Dated Los Angeles, Cal., Sept. 27, 1923.

RAYMOND IVES BLAKESLEE,

J. CALVIN BROWN,

Solicitors and Counsel for Defendants.

Good cause being shown therefor, the time of notice provided by Court Rule 8 is hereby shortened to three days.

BLEDSOE,

U. S. District Judge. [27]

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In the United States District Court, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

AMENDMENT TO ANSWER OF DEFEND-  
ANTS.

Now come the defendants above named, and beg leave of this Honorable Court to amend their answer as follows:

By adding paragraph VXIII-a as follows:  
XVIII-a.

That upon information and belief, the defendants and each of same allege that the said August Ro-

berti, Jr., and Edward L. Roberti were not the original and first inventors or discoverers of the invention purporting to be covered by letters patent of the United States No. 1,180,432, dated April 25, 1916, or of any material or substantial part thereof, and that the same, or material, or substantial parts thereof had been in public use and on sale and known in this country prior to said alleged invention, and for more than two years before the application for said letters patent; and further, that such knowledge and use was had and used by the following named persons:

Imperial Cotton Works, a corporation of the State of California, whose principal place of business was in Los Angeles, California, and not now in existence, who so used it at Los Angeles, California; Edward W. Fox, whose residence is Lankershim, California, formerly principal owner and president of said Imperial Cotton Works, who so used it at Los Angeles, California; [28]

L. C. Alexander, whose residence is 936 West 37th Street, Los Angeles, California;

Mrs. Thomas A. Brewer, 224 E. 54th Street, Los Angeles, California;

Walter Inscho, present address unknown, but whose address defendants beg leave of this Court to insert by amended answer when ascertained;

Ray A. Garetson, Fruitvale, California, who so used it at San Diego, California;

Garetson Manufacturing Company, of San Diego, California, now bankrupt, through its officers and employees, certain of such former officers and em-

ployees being said Ray A. Garetson, and William Warren, whose present address is believed to be San Diego, who so used it at San Diego, Cal.;

Robert Hamilton and T. L. Park, whose present addresses are unknown but believed to be at San Diego, California.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [29]

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In the United States District Court, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

AFFIDAVIT OF J. CALVIN BROWN.

United States of America,  
State of California,  
County of Los Angeles,—ss.

J. Calvin Brown, being first duly sworn in accordance with law, deposes and says: That he is a member of the law firm of Blakeslee & Brown, and one of the counsel for the defendants above named; that he has been making diligent search

to ascertain persons and firms having prior knowledge or use of the mattress patented by August Roberti and Edward L. Roberti, being United States letters patent No. 1,180,432, dated April 25, 1916, and that the names of such persons and firms and their locations of residence were learned for the first time on the 24th day of September, 1923.

J. CALVIN BROWN.

Subscribed and sworn to before me this 27th day of Sept., 1923.

[Seal]

MILDRED LEACH,

Notary Public in and for the County of Los Angeles,  
State of California. [30]

[Endorsed]: In Equity—No. ——. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Notice of Amendment to Answer of Defendants, Amendment to Answer, and Affidavit of J. Calvin Brown. Received copy of the within notice this 28th day of September, 1923. Frank L. A. Graham, Attorney for Plaintiff. Filed Sep. 29, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, 727-300 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [31]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE OF MOTION FOR BILL OF PARTICULARS.

To Plaintiff Above Named, and to Graham & Harris, Esqrs., Their Solicitors and Counsel:

Please take notice that the accompanying defendants' motion for bill of particulars will be presented before the above-entitled Court, at the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, November 19, 1923, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

This motion is based upon the records, files and proceedings in this case, upon Equity Rule 20, and the case of *Wilson vs. Union Tool Co.*, 275 Federal, 624.

Dated Nov. 2, 1923.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [32]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE AND MOTION REQUIRING PLAINTIFFS TO FILE BILL OF PARTICULARS WITHIN TEN DAYS.

To Plaintiffs Above Named, and to Graham & Harris, Esqrs., Their Solicitors and Counsel:

Please take notice that on November 12, 1923, at the hour of ten o'clock A. M. in the courtroom of Judge Benjamin F. Bledsoe, in the Federal Building, Los Angeles, California, defendants upon presenting the annexed motion for bill of particulars will move the Honorable Court for an order requiring plaintiffs to serve and file their bill of particulars within ten days from and after the 12th day of November, 1923.

This motion is based upon the records, files and proceedings in this case.

Dated Nov. 2, 1923.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [33]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MOTION FOR BILL OF PARTICULARS.

Come now the defendants above named and by their solicitors and counsel move the Court for an order directing the plaintiffs to file bill of particulars setting forth in detail:

I.

Which of the claims of United States letters patent No. 1,180,432 are alleged to be infringed by defendants?

II.

Which of the numerous devices made, used or sold by defendants are alleged to infringe the letters patent in suit?

III.

Of the devices specified and particularly two alleged to infringe the letters patent in suit, enumerate which ones are alleged to infringe by making, using or selling, and particularly in what manner?

IV.

Precisely what do plaintiffs assert or claim is

new or patentable in each of the claims of the patent in suit alleged to be infringed?

#### V.

Precisely where in defendants' alleged infringing device [34] or devices the plaintiffs assert there is found the features set forth as new and patentable in response to paragraph III hereof, and in that connection that plaintiffs:

(a) Point out by reference characters applied to a drawing or cut of defendants' alleged infringing device or devices the elements of each of the claims of the patent in suit alleged to be infringed.

(b) Point out by reference characters applied to a drawing or cut of defendants' alleged infringing device or devices the features set forth as new and patentable in response to paragraph III hereof.

#### VI.

Which of the words "Sanotuf," "Restmore," "Tiednotuft," and "Restamore" will it be contended defendants use in violation of any alleged right of plaintiffs to exclusive use of such word or words?

#### VII.

Of the words set forth in paragraph VI hereof how long have plaintiffs used the same, and in that connection state:

(a) The extent of use of such words or any thereof;

(b) Upon what articles they have applied such word or words;

(c) State the use of such words or any thereof,



whether in intrastate or interstate, or both, commerce;

(d) Point out and precisely state wherein there is any similarity, deceptive or otherwise, between the words "Restmore" and "Restamore";

(e) Is the word "Restmore" a registered trademark of the State of California or of the United States and contended to *belong plaintiffs* as to exclusive right to use same;

(f) Is "Restmore" a general classification or a word designating quality of mattress under a general alleged trademark "Sanotuf"? [35]

(g) Is "Sanotuf" a registered trademark of this state or the United States?

(h) Precisely in what manner does the word "Tiednotuft" alleged to be used by defendants in injury to plaintiffs, injure plaintiffs?

(i) In what manner does the word "Tiednotuft" deceive the public and trade into the belief that the mattresses alleged to be sold and made by defendants were in fact mattresses made and sold by plaintiffs?

(j) In what manner does the word "Restamore" deceive the public and trade into the belief that the mattresses alleged to be sold and made by defendants were in fact mattresses made and sold by plaintiffs?

(k) How do the plaintiffs intend to prove or show, and precisely in what manner, the intent to deceive the public and trade into the belief that the mattresses made and sold by defendants were in fact the mattresses made and sold by plaintiffs by

the alleged use by defendants of the words "Tied-notuft" and "Restamore" or either of same as set forth in plaintiffs' complaint in paragraph VIII.

(1) Which of the four words mentioned in the beginning of this paragraph VII is it contended defendants use in violation of the alleged rights of plaintiffs as set forth in paragraph X of plaintiffs' complaint?

(m) Which of the four words above mentioned are plaintiffs now using, and in that connection state:

1. The length of time of such use, stating the exact date the use of such word or words was commenced.
2. Upon what class of goods they are used.
3. Are they still using such word or words?
4. If they are still using such word or words are they still using them on the same class of goods?
5. Has any such use ever been interrupted, and if so when and for how long? [36]

#### VIII.

Precisely point out and distinctly state what unlawful acts have been committed by defendants in alleged violation of plaintiffs' rights which will cause plaintiffs alleged irreparable damage for which plaintiffs have no plain, speedy, or adequate remedy at law, as set forth in paragraph XI of plaintiffs' complaint, and of the said acts state the following:

- (a) Precisely where the alleged acts occurred.

(b) When the alleged acts complained of occurred.

(c) And precisely what the alleged acts were.

IX.

Precisely in what manner is the reputation of plaintiffs' business in danger and its sale of mattresses by reason of any alleged acts of defendants been or will be seriously reduced as set forth in paragraph XII of plaintiffs' complaint?

X.

Of the alleged acts in paragraph X, XI and XII of plaintiffs' complaint precisely which firms and person or persons is it alleged that defendants are alleged to have deceived into believing that the mattresses made and sold by such defendants are in fact the mattresses of plaintiffs; and in that connection precisely point out:

(a) What plaintiffs intend to prove by each witness;

(b) And who such witness shall be, giving the name and address in each instance.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [37]

[Endorsed]: In Equity—No. G-79J. In the United States District Court, Southern District of California, Southern Division. August Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Motion for Bill of Particulars and Notice Thereof and Notice of Motion Requiring Plaintiff to File Bill of Particulars. Received copy of the within

motion this 2d day of November, 1923. Frank L. A. Graham, Ford W. Harris, Attorneys for Plaintiff. Filed Nov. 3, 1923. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [38]

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At a stated term, to wit, the July term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 19th day of November, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. G-79-J.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—NOVEMBER 19, 1923—  
ORDER RE BILL OF PARTICULARS.

This cause coming on at this time for hearing on motion of defendants for bill of particulars; At-

torney Graham, of Messrs. Graham & Harris, appearing as counsel for the plaintiffs and Attorney Brown of Messrs. Blakeslee & Brown appearing on behalf of the defendants, and said Attorney Brown having made a statement in support of bill of particulars and Attorney Graham, Esq., having argued in opposition thereto, it is by the Court ordered that the motion of defendant for a bill of particulars be granted as to paragraphs 1, 2, 3, 4, 5, 6, 7 and 8, except as to section (d) of paragraph 7—(h) (i) (j) (k) and sec. 3, 4, 5 of sec. (m) paragraph 7—and paragraph 9, which are denied; and paragraph #10 having been withdrawn by said Attorney Brown, it is by the Court ordered that plaintiff herein have twenty days within which to file bill of particulars. [39]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G.-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

BILL OF PARTICULARS.

Come now the plaintiffs in the above-entitled action and present this their bill of particulars:

I. Each and all of the claims.

II. While plaintiff is without knowledge as to the entire line of goods made or sold by defendant, plaintiff particularly charges infringement by the manufacture and sale by defendant of all mattresses made in accordance with the Malerstein patent No. 1,421,274 and modified forms of such mattress, also certain mattresses made or sold like defendants' mattress marked "Blue Ribbon."

III. All those enumerated in paragraph 2 above by making or selling and causing to be used.

IV. The combination set forth in each claim as a separate combination. Also the feature of inserting ties through permanent openings in the tick members. Also the feature of inserting ties through permanent openings in the upper and lower tick members to engage tabs, loops or other members secured to the respective upper and lower members. Also the feature of providing tabs, loops or extensions on the upper and lower tick members which permit [40] a tufting of the filling, leaving the tick members substantially flat. Also the feature of providing tabs, loops or extensions on the upper and lower tick members arranged to be engaged by ties whereby the filling is tufted without giving the surface of the tick members a tufted appearance. Also the provision of permanent openings in the tick members through which tufting of the filling may be made by concealed ties.

V. Reference for answer to this, as to that por-

tion marked (a), is made to Exhibit "A" attached hereto.

(b) The features new and patentable in plaintiffs' mattress also found in defendant's infringing mattress are the combinations enumerated in the respective claims as pointed out by reference letters under the answer to (a) above and in addition thereto the features scheduled under answer 4 above.

VI. Tiednotuft and Restamore are used by defendants as violation of the rights of plaintiff in the words Sanotuf and Restmore.

VII. Sanotuf and Restmore—

(a) Sanotuf—All mattresses made under the patent in suit and embracing seven different grades of mattresses.

Restmore—has been used upon a certain grade of mattress prior to the use of the word Sanotuf and subsequently to the adoption of the word Sanotuf.

(b) Mattresses.

(c) Both. [41]

(f) Restmore is used upon a certain grade of mattresses containing a certain grade of filler.

(g) Yes. U. S.

(l) Tiednotuft and Restamore.

(m) Sanotuf and Restmore.

(1) Sanotuf since on or about June 1st, 1915. Restmore since on or about the year 1903. Unable to state the exact dates.

(2) Mattresses.

VIII. Paragraph XI in bill of complaint refers to use by defendants of the words "Tiednotuft" and "Restmore" in violation of plaintiffs' rights in the words "Sanotuf" and "Restmore."

- (a) In Los Angeles, California.
- (b) Prior to the filing of the bill of complaint and subsequent thereto.
- (c) The sale of all mattresses infringing upon plaintiffs' and marked with the words "Tiednotuft" and "Restmore."

AUGUST ROBERTI, Jr.,  
EDWARD L. ROBERTI.

By FRANK L. A. GRAHAM,  
FORD W. HARRIS,

Their Attorneys.

Note.—The numbering of the above paragraphs corresponds to the numbering of the paragraphs in motion for bill of particulars. [42]

### EXHIBIT "A."

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

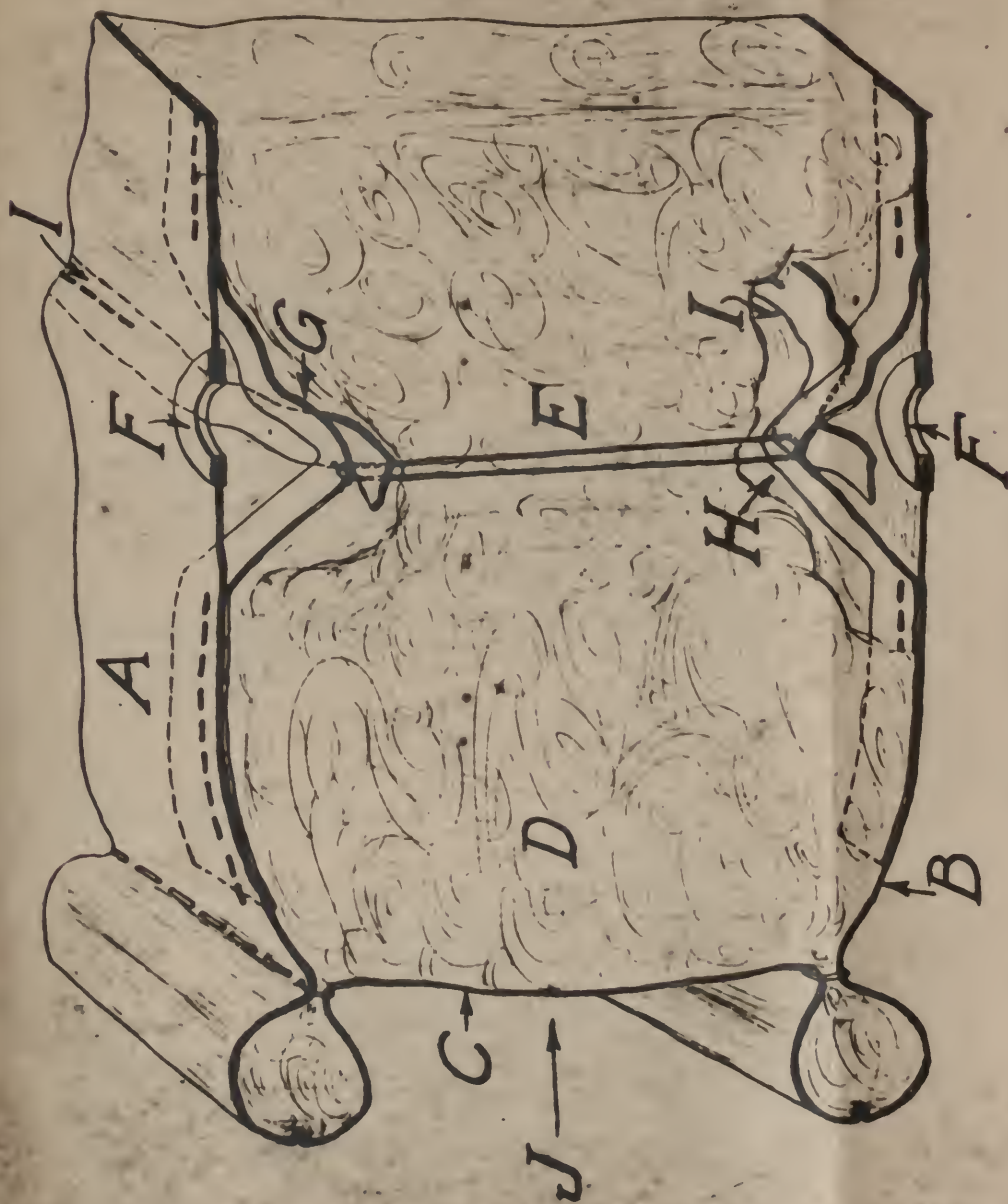
J. H. JONAS et al.,

Defendants.



1. A mattress comprising:
  - A. an upper tick member;
  - B. a lower tick member;
  - C. boxing secured to said members in such a manner as to form an enclosed tick;
  - D. filling for said tick;
  - E. ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points;
  - F. eyelets in said tick members through which said ties may be put in place.
2. A-B-C-D-
  - G. upper tabs secured to said upper tick member;
  - H. lower tabs secured to said lower tick member, said tabs projecting into said filling;
  - E. ties for connecting each upper tab with a corresponding lower tab.
  - F. [43]
3. A-B-C-D-G-H-
  - E. string ties each sewn through an upper and lower tab and knotted in such a manner so as to form a closed loop connecting said upper and lower tabs;
  - F.
4. A-B-C-D-
  - I. reinforcing strips running across the inner surfaces of said tick members and secured thereto;

- G. upper tabs secured at intervals to said reinforcing strips on said upper member;
  - H. lower tabs secured at intervals to said reinforcing strips on said lower member;
  - E. ties for connecting said tabs in pairs;
  - F.
5. A-B-C-D-I-G-H-
- E. string ties each sewn through an upper and lower tab and knotted in such a manner so as to form a closed loop connecting said upper and lower tabs;
  - F.
6. A-G-E-F-
7. J. a tick;
- G. and H. tabs secured to the inner side of said tick;
  - E. anchoring means for said tabs;
  - F. an eyelet in said tick above each of said tabs.
8. J.
- I. a reinforcing strip secured to the inner side of said tick;
  - G. and H. tabs secured to said reinforcing strip;
  - E. anchoring means for said tabs;
  - F. [44]





[Endorsed]: No. No. G-79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Bill of Particulars. Received copy of within — this 10th day of Dec., 1923. Blakeslee & Brown, Attorneys for Def. Filed Dec. 10, 1923. Chas N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building Los Angeles, Cal., Attorneys for Plaintiffs. [46]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PETITION FOR LEAVE TO AMEND ANSWER.

Come now the defendants above named through their solicitors and counsel, Raymond Ives Blakeslee and J. Calvin Brown, and beg leave of this Honorable Court to permit the defendants to amend their answer by adding paragraph XVIII-b, as follows:

## XVIII-b.

Further answering each defendant is informed and believes, and therefore alleges and avers that August Roberti, Jr., and Edward L. Roberti surreptitiously or unjustly obtained the patent for mattresses set forth in United States letters patent No. 1,180,432, dated April 25, 1916, for that which was in fact the invention of another, to wit, William R. Daniel, whose address is 117 Callisch Street, Fresno, California, which Daniel was using reasonable diligence in adopting and perfecting the same prior to the alleged invention of August Roberti, Jr., and Edward L. Roberti, and prior to the date of application of said letters patent No. 1,180,432.

Dated: Los Angeles, Cal., Dec. 12, 1923.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [47]

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Notice of Motion to Amend Answer and Amendment to Answer and Supporting Affidavits. Received copy of the within — this 12th day of December 1923. Frank L. A. Graham, Attorney for Plffs. Filed Dec. 14, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [48]

At a stated term, to wit, the July Term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday the 17th day of December, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WM. P. JAMES, District Judge.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., et al.,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—DECEMBER 17, 1923—  
ORDER GRANTING MOTION TO AMEND  
ANSWER.

This cause coming before the court at this time for hearing on motion to amend answer and for hearing on motion for a continuance of trial; L. A. Graham, Esq., appearing as counsel for the plaintiffs and J. Calvin Brown, Esq., appearing as counsel for the defendants, it is by the Court ordered that the motion to amend answer be granted and that this cause be continued to February 5th, 1924, for hearing upon the payment by the defendant to the plaintiff of \$250.00 as terms. [49]

At a stated term, to wit, the January Term, A. D. 1924, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the 3d day of June, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable WM. P. JAMES, District Judge.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, DAVID A. JONAS, and HARRY J. MALERSTEIN,  
Defendants.

MINUTES OF COURT—JUNE 3, 1924—ORDER FOR INTERLOCUTORY DECREE, ETC.

Interlocutory decree is ordered to be entered determining the validity of plaintiffs' patent as to claims 2 and 3, and that defendants have been guilty of infringement, by reason of which plaintiffs have suffered damage. Writ of injunction is ordered to be issued to prevent further acts of infringement and reference is ordered to Earl E. Moss, Esq., as Special Master to take testimony



and return findings as to the amount of damage which plaintiffs are entitled to recover by reason of acts of infringement committed by defendants. Plaintiffs to recover costs. Written opinion filed. [50]

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In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,  
Defendants.

OPINION.

FRANK L. A. GRAHAM, FORD W. HARRIS,  
Attorneys for Plaintiffs.

RAYMOND I. BLAKESLEE, J. CALVIN BROWN,  
Attorneys for Defendants.

Plaintiffs here, alleging themselves to be the joint inventors and owners of rights secured to them under letters patent No. 1,180,432 issued April 25, 1916, sue to restrain the defendants from infringing, and to have an accounting and damages.

The art involved is that of the construction of

bed mattresses, which are commonly made by the enclosing of hair, wool, cotton or some other soft material between upper and lower fabric covers with side boxing of like material. The evidence in the case discloses that it [51] is necessary that ties or some sort of cord shall be run through the mattress from cover to cover at intervals, which ties are of uniform length and customarily divide the top and bottom covers into rectangles or "biscuits." By the use of these ties, uniform thickness is secured and the filling of the mattress is less likely to become displaced and create unevenness. These and other advantages have made the use of ties indispensable to the manufacturer of a marketable mattress. The earlier methods included the fastening of the ends of the ties on the outer covers of the mattress, producing what is known as "tufts." It was recognized that it was desirable to dispense with these tufts, because they furnished a lodging place for dust or dirt and added to the difficulties of cleaning the mattress. To obviate this objectionable feature, the ingenuity of mattress makers was employed in the direction of discovering some means by which the ties could be placed without having a surface tuft on the covering of the mattress. Busche in 1904, in the art of cushion making, patented a method of using a button with a shank eye or thread holes which he placed between the outer cushion cover and a retaining strip sewn to the under side of the cover. Micon, In January, 1915, secured a patent upon a combination including the subdividing of the interior of the mattress

into compartments, the divisions being formed by strips or tabs fastened to the inner side of the upper and lower covers, the flap from the above meeting the flap from below and being tied to it after each compartment had been filled. Other patents have been exhibited, showing advances made in the art, including re-enforcing strips across the inner sides of the covers, as in the Van Vorst patent of May 4, [52] 1915. In none of the early combinations exhibited, either by the patents referred to or others introduced in evidence, could the complete operation of inserting and fastening the ties in a tuftless mattress, be done after the filling had been placed between the covers provided for it. Plaintiffs, in their combination, used inner tabs stitched to the inside of the mattress covers, and added an eyelet in the outside mattress covers through which to insert a mattress needle carrying the tie cord. The tabs were so fastened that when the filling was pushed into the mattress it would press the tabs squarely against the eyelet, so that when the needle was inserted it necessarily passed through the tab attached to both the upper and lower cover. The method was, after running the needle through from side to side, to bring it back, taking care that it did not pass through the same point in the tab on the return passage as on the first. Having then both ends of the tie cord on the outside of the initial eyelet, a knot would be tied which, upon being pulled through the eyelet, would in turn pull the ends of the tabs toward each other and into the mattress filling. When the desired spacing between the up-

per and lower mattress cover had been obtained, the tie cord extending from the eyelet would be cut, and the cut end pushed through out of view. The general advantageous result obtained would be a completed mattress without tufts, in which the filling could be completely placed before the insertion of any ties, and in which ties could be affixed and fastened easily and quickly.

There was nothing new or novel in the use of inner tabs or flaps sewn to the inside covers; there was—and the history of the art clearly shows this to be true— [53] novelty in the use of the eyelet in conjunction with the inner tabs or flaps. Eyelets were old, but not in the same relation. Their use in the mattress combination as embraced in plaintiffs' claims was not a matter of obvious expedient apparent to persons skilled in the art, else why, in view of the former cumbersome methods of fastening ties by hand on the inside of the unfilled mattress tick, had they not been used before? The fact that mattresses in which the eyelet is used appear to enjoy a preferential demand on the market is ample proof that they represent a pronounced advance in mattress manufacture.

Defendants, however, claim that in the making of their mattresses they used a combination essentially different from that of the plaintiffs. They exhibit letters patent No. 1,421,274, issued on June 27, 1922, to H. J. Malerstein, who is a relative of his codefendants, and claim that their mattresses are made according to that design strictly. Malerstein made use of strips

sewn to the inner side of the mattress covers, to which he fastened his ties. These strips crossed at right angles and were stitched to the cover at each end, but were loose between the stitching points, so that when the tie was attached, the strips would depend into the mattress filling. He used the eyelet, however, placing it above (or under) the point where the strips crossed, and inserted his cord tie there through. Instead of piercing the cloth strips, as the Robertis did, he passed the cord on either side of the crossed strips. The only physical difference between his combination, or the mode of placing his ties, was in the construction of the strips and the putting of the tie on either side of the crossing point instead of through the fabric.

[54]

I am of the opinion that plaintiffs' patent covers a mattress whereby tabs or their equivalents are used on the inner covers of the mattress and through which, by means of an eyelet placed in such covers, ties are inserted and fastened. I believe that claims 2 and 3 are infringed by the mattress manufactured by the defendants under the Malerstein design. The plaintiffs have not so limited the tabs used as to define them to be of particular size, shape or kind of material, and are entitled to be protected against equivalents within a reasonable range. The strips used by Malerstein perform precisely the same function in substantially the same way as the Roberti tabs. They may be stronger, by reason of their double attachment, but they are stitched to the covers and do furnish the support for the

ties, altogether similar to the Roberti tabs. Malerstein did not dispense with the eyelet, and without it his strips could not have been tied without resorting to some of the older and before mentioned cumbersome methods. It appears fairly evident that the effort of Malerstein was to take advantage of the eyelet feature of the Robertis' patent; at the same time he endeavored to make such a change in the inner attachment of the tabs as would aid his claim that there was no substantial identity to claim infringement upon. I do not think that he has succeeded in doing this. The fact that he secured a patent does not establish that his combination does not infringe the rights granted to the Robertis. The Patent Office may have considered that there was some improvement worked in his combination over that of the Robertis, but, if so, he is to be protected only in the improvement, which does not carry with it a right to make use of the [55] substance of the prior invention. If this were not true, then a patent right would be practically without value, and offer no security to the inventor.

The defense that plaintiffs were not the first inventors of their combination, because of the discovery and disclosure of Daniel in 1913, and Avril in 1916, should be decided against the defendants. Daniel filed his petition for a patent in the Patent Office in February, 1913. His design covered the construction of a mattress without eyelets. At intervals on the inner side of the top and bottom covers he stitched strips continuously across his

mattress, which were loose between the lines of stitching. He placed his ties by working a needle carrying the tie cord through the outer cover and inner strip, and through the lower cover and inner strip, bringing the needle back through the same hole of the outer cover below, working it through a different place in the two inner strips, and out the same hole in the upper strip. He then tied his knot and worked the knot through the hole in the upper cover, and worked the threads of the upper cover together so that the hole would not be visible. Against this application the Examiner particularly cited the Busche patent, and Daniel abandoned the further prosecution of his application. The Daniel disclosure without the eyelet would not effect the novelty of the Roberti combination.

Joseph Avril made an application on December 1, 1916, for a patent, and the disclosure there made is also urged in defense. It is to be noted that this application was filed about eight months after the patent of plaintiffs had been granted, and over a year after plaintiffs' application was made, which was of date February 18, [56] 1915. Evidence was introduced with the intent to prove that Avril had invented and manufactured a mattress using eyelets and tabs, prior to the time that plaintiffs claim to have originated their combination, and further, that the Avril mattress had been examined by one of the Robertis, the inference suggested being that plaintiffs had not in fact made the invention claimed, but had improperly made use of the invention of another as a basis for their patent

application. A defense of this kind, as I understand the law, must be clearly established by satisfactory evidence, and viewing all of the testimony given, this issue, I think, under that measure of proof, must be decided against the defendants. The preliminary statement of Avril, made to the Patent Office, which presumably was not disclosed to the plaintiffs until after they had made a like statement, showed that Avril claimed his invention to have been made at a time subsequent to that shown by the preliminary statement of the plaintiffs. Avril had made up an earlier design and filed on it in July, 1916. In that design he used the eyelet with the tab attached at one end only, whereas in the application of December, 1916, he attempted to differentiate from the Robertis' patent by attaching his tab at two points and tying through or around the loop, using nevertheless the eyelet.

That the Robertis were joint inventors I think is fairly established by the evidence. The issue as to the alleged unfair competition arising by use of claimed similarity of the names used by the defendants on their product to those of plaintiffs, I understand the plaintiffs to have abandoned.

From the conclusions expressed it follows that [57] an interlocutory decree should be entered determining the validity of the patent of plaintiffs as to the claims specified, and that the defendants have been guilty of infringement, by reason of which plaintiffs have suffered damage. The decree will provide further for the issuance of a writ of injunction to prevent further acts of infringement, and



for a reference to Earl *F. Moss*, Esquire, as Special Master to take testimony and return his findings as to the amount of damage which plaintiffs are entitled to recover by reason of the acts of infringement committed by the defendants; plaintiffs to have all proper costs by them incurred in this behalf.

Dated this 3d day of June, 1924.

WM. P. JAMES,  
District Judge.

[Endorsed]: In Equity—No. G-79. U. S. District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. Opinion. Filed Jun. 3, 1924. Chas. N. Williams, Clerk. Murray E. Wire, Deputy. [58]

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In the District Court of the United States, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm  
Name of J. H. JONAS & SONS, JACOB H.  
JONAS, MAX I. JONAS, DAVID A.  
JONAS, and HARRY J. MALERSTEIN,  
Defendants.

## INTERLOCUTORY DECREE.

This cause having heretofore come on regularly to be heard and tried in open court before United States District Judge, Wm. P. James, upon proofs, documentary and oral, taken and submitted in the case, and being of record therein; the plaintiffs being represented by Messrs. Frank L. A. Graham and Ford W. Harris, and the defendants by Messrs. Raymond I. Blakeslee and J. Calvin Brown; and the cause having been submitted on proofs to the Court for its consideration and decision; and the Court being now fully advised in the premises, and its opinion having been rendered and filed herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiffs, August Roberti, Jr., and Edward L. Roberti, are the rightful owners of United States letters patent No. 1,180,432 granted April 25, 1916, entitled Non-stretching Ventilated Mattress; and said letters patent No. 1,180,432 are good and valid in law, particularly as to claims 2 and 3 thereof, and the Court makes no finding as to the validity of [59] any of the other claims of said patent.

2. That defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, have infringed upon claims 2 and 3 of said letters patent No. 1,180,432, by making and causing to be made, and selling and causing to be

sold, and causing to be used mattresses embodying the invention patented in and by the said claims 2 and 3 of plaintiffs' patent No. 1,180,432.

3. That defendants, their officers, agents, servants, employees, and attorneys, and those in active concert or participating with them, and each of them be, and they are, and each of them is, hereby permanently enjoined and restrained from making, using or selling, or causing to be made, used or sold, any mattress or mattresses embodying or containing the invention described and claimed in and by the said claims 2 and 3 of plaintiffs' letters patent No. 1,180,432, and each or any of said claims; and from infringing upon and from contributing to the infringement of said claims or either of them; and that a permanent writ of injunction issue out of and under the seal of this Court, commanding and enjoining said defendants, their officers, agents, servants, employees, and attorneys, and those in active concert or participating with them, and each of them, as aforesaid.

4. That plaintiffs have and recover of and from the said defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, the profits which said defendants, and each of them, have realized, and the damages which plaintiffs have sustained from and by reason of the infringement aforesaid; [60] and for the purpose of ascertaining and stating the amount of said profits and damages, this cause is hereby referred to Earl F. Moss, Esq., as Special Master *pro hac*

*vice* to ascertain, take, state and report to this Court an account of all the profits received, realized or accrued by, or to the defendants, and to assess all the damages suffered by the plaintiffs from and by reason of the infringement aforesaid; and that on said accounting the plaintiffs have the right to cause an examination of defendants, their officers, agents, servants, and employees, and each of them, *ore tenus*, and also be entitled to the production of the books, vouchers, documents and records of the defendants, their officers, agents, servants, and employees, and each of them, in connection with the accounting; and that the said defendants, their officers, agents, servants, and employees, and each of them, attend for such purpose before the Master from time to time as the Master shall direct.

5. That the plaintiffs have and recover their costs and disbursements in this suit to be hereafter taxed, and that the plaintiffs have the right to apply to the Court from time to time for such other and further relief as may be necessary and proper in the premises. Costs taxed at \$60.30.

Dated at Los Angeles, California, this 5 day of June, 1924.

WM. P. JAMES,

United States District Judge.

Approved as to form, as provided in Rule No. 45.

RAYMOND IVES BLAKESLEE,

J. CALVIN BROWN,

Attorneys for Defendants.

Decree entered and recorded Jun. 5, 1924.

CHAS. N. WILLIAMS,  
Clerk.

By Murray E. Wire,  
Deputy Clerk. [61]

[Endorsed]: Original. No. G-79—Eq. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Interlocutory Decree. Filed Jun. 5, 1924. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [62]

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In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,  
Defendants.

## PERMANENT INJUNCTION.

The President of the United States, to J. H. Jonas, Doing Business Under the Firm Name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, Their Officers, Agents, Servants, Employees, and Attorneys, and Those in Active Concert or Participating With Them, GREETING:

WHEREAS, it has been represented to us in our District Court of the United States for the Southern District of California, Southern Division, that letters patent of the United States No. 1,180,432 were granted on April 25, 1916, for Non-Stretching Ventilated Mattress, of which patent plaintiffs are the rightful owners; that said letters patent are good and valid in law and have been infringed by the defendants herein, by the [63] manufacture and sale of mattresses containing and embodying the inventions set forth in claims 2 and 3 of said letters patent No. 1,180,432,—

NOW, THEREFORE, we do hereby strictly command and permanently enjoin and restrain you, your officers, agents, servants, employees, and attorneys, and those in active concert or participating with you, from making, using or selling, or causing to be made, used, or sold, any mattress or mattresses embodying or containing the invention described and claimed in and by the said claims 2 and 3 of plaintiffs' letters patent No. 1,180,432, and each or any of said claims, and from infringing upon and

from contributing to the infringement of said claims, or either of them (in accordance with decretal provision of paragraph 3 of the Interlocutory Decree entered herein June 5th, 1924).

Hereof fail not, under penalty of the law thence ensuing.

WITNESS the Honorable WM. P. JAMES, United States District Judge for the Southern District of California, this 6th day of June, 1924.

[Seal] CHAS. N. WILLIAMS,  
Clerk U. S. District Court, Southern District of California.

By R. S. Zimmerman,  
Deputy Clerk. [64]

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,  
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed writ on the therein named David A. Jonas by handing to and leaving a true and correct copy thereof with David A. Jonas, personally, at Los Angeles, in the said District, on the 13th day of June, A. D. 1924.

A. C. SITTEL,  
U. S. Marshal.  
By M. J. Finn,  
Deputy.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,  
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed writ on the therein named Max I. Jonas and Harry J. Malerstein by handing to and leaving a true and correct copy thereof with Max I. Jonas and Harry J. Malerstein, personally, as Los Angeles, in said District, on the 9th day of June, A. D. 1924.

A. C. SITTEL,  
U. S. Marshal.  
By M. J. Finn,  
Deputy.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,  
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed permanent injunction on the therein named J. H. Jonas, doing business under the firm name of J. H. Jonas and Sons, by handing to and leaving a true and correct copy thereof with J. H. Jonas, sole owner and *individually* personally, at Los Angeles in said District, on the 7th day of June, A. D. 1924.

A. C. SITTEL, [65]  
U. S. Marshal.  
By M. J. Finn,  
Deputy.



[Endorsed]: Original. Marshal's Civil Docket No. 4989, No. G-79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants In Equity. Permanent Injunction. Filed Jun. 13, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [66]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PETITION FOR ORDER ALLOWING APPEAL.

J. H. Jonas, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, defendants in the above-entitled cause, conceiving themselves to be aggrieved by the order and interlocutory decree filed and entered on the 3d day of June, 1924, whereby it was ordered, adjudged and decreed that defendants were guilty of infringement of

plaintiffs' letters patent and particularly as to claims 2 and 3 thereof, as in said interlocutory decree set forth, now come Raymond Ives Blakeslee and J. Calvin Brown, solicitors for defendants, and petition said Court for an order allowing defendants to prosecute an appeal from said interlocutory decree to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and for the reasons specified in the assignment of errors which are filed herewith; and also that an order be made fixing the security which defendants shall give and furnish upon such appeal; and that a citation issue as provided by law, and that a certified transcript of the record, proceedings and papers upon which said interlocutory decree was based be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, together with the exhibits on file in this cause, in accordance with the Rules in Equity promulgated by the Supreme Court of the United States and the Statutes made and provided.

Dated Los Angeles, Cal., July 2, 1924.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants. [67]

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Peti-

tion for Order Allowing Appeal, Filed Jul. 2, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., J. Calvin Brown, Solicitors for Defendants. [68]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the defendants having filed their petition for an order allowing an appeal from the order of this Court made and entered June 3, 1924, together with assignment of errors, now upon motion of J. Calvin Brown, a solicitor for defendants,—

IT IS ORDERED that said appeal be and hereby is allowed to defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the said order or interlocutory decree made and entered by this Court in this cause on June 3, 1924, wherein and whereby the validity of plaintiffs'

patent as to claims 2 and 3 was determined, and that defendants have been guilty of infringement thereof, by reason of which plaintiffs have suffered damage; the granting of an injunction and further awarding costs to plaintiffs, and that the amount of defendants' bond on said appeal be, and the same is hereby fixed at the sum of \$250.

IT IS FURTHER ORDERED, that upon the filing of said security a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules in Equity by the Supreme Court of the United States promulgated and in accordance with the statutes made and provided, together with exhibits on file in this case, or duly certified copies thereof.

Dated Los Angeles, Cal., July 2, 1924.

WM. P. JAMES,  
Judge. [69]

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Order Allowing Appeal. Filed Jul. 2, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal. J. Calvin Brown, Solicitors for Defendants. [70]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ASSIGNMENT OF ERRORS.

Come now the defendants above-named, and specify and assign the following as the errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree or order of June 3, 1924, granting an injunction against said defendants as in said interlocutory decree set forth; that said District Court of the United States for the Southern District of California, Southern Division, in making and entering said decree erred as follows:

I.

In entering any decree in favor of plaintiffs.

II.

In adjudging and decreeing that claims 2 and 3 of plaintiffs' patent in suit No. 1,180,432 or said patent in any respect, is or are good and valid in law or in any respect.

## III.

In adjudging and decreeing that said patent or any claims thereof have been or are infringed by defendants in any respect whatsoever, as referred to in the last paragraph of said interlocutory decree, or in any manner or by any device sold by defendants.

## IV.

In ordering, adjudging and decreeing that plaintiffs [71] have and recover from the defendants plaintiffs' costs and disbursements in said cause.

## V.

In ordering, adjudging and decreeing that plaintiffs recover from defendants any damages caused *as per its received* by reason of said defendants' infringement of said plaintiffs' letters patent and in ordering any accounting to that end.

## VI.

In ordering, adjudging and decreeing that plaintiffs were entitled to an injunction as prayed for.

## VII.

In not ordering, adjudging and decreeing that defendants were entitled to costs as prayed for.

## VIII.

In not ordering, adjudging and decreeing that the bill of complaint in said cause be dismissed without costs and disbursements to defendants.

## IX.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 2 and 3 thereof were void for want of invention.

X.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 2 and 3 thereof were void because anticipated, that is for want of novelty.

XI.

In not ordering, adjudging, and decreeing that said Roberti letters patent in suit and all the claims thereof and particularly claims 2 and 3 found infringed are void because of prior invention and disclosure to said plaintiffs of the invention of plaintiffs' patent by Joseph Avril. [72]

XII.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and all the claims thereof and particularly claims 2 and 3 found infringed are void because of prior invention and disclosure to said plaintiffs of the invention of plaintiffs' patent by William R. Daniel.

XIII.

In not ordering, adjudging and decreeing that said claims 2 and 3 of said Roberti letters patent should be strictly construed in view of the file-wrapper so that defendants' structure does not infringe such claims.

XIV.

In not ordering, adjudging and decreeing that the mattress manufactured by defendants under the Malerstein patent No. 1,421,274 is not anticipated by Roberti letters patent.

XV.

In not ordering, adjudging and decreeing that

claims 1, 6 and 7 of the Roberti letters patent in suit are void, because anticipated, that is, for want of novelty.

#### XVI.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 1, 6 and 7 are void for want of invention.

#### XVII.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 1, 6 and 7 should be narrowly construed in view of the limitations in the file-wrapper of such patent.

#### XVIII.

In dismissing and overruling the defendants' motion to dismiss plaintiffs' bill of complaint and assessing \$20.00 as terms against defendants. [73]

#### XIX.

In not ordering, adjudging and decreeing that plaintiffs' bill of complaint should be dismissed pursuant to Equity Rule 29 for attempted joinder in one cause of action of a cause over which the Court has jurisdiction with one over which it has not jurisdiction, viz.: patent infringement and unfair competition.

#### XX.

In not finding that defendants made out each of the defenses interposed to the bill of complaint of plaintiffs.

#### XXI.

In adjudging and decreeing that August Roberti and Edward L. Roberti are joint inventors of the letters patent in suit.



XXII.

In order that the foregoing assignment of errors may be and appear of record, defendants present the same to the Court and pray that such disposition may be made thereof and in accordance with the laws of the United States thereunto provided.

WHEREFORE, all the said defendants pray that the said interlocutory decree of this Court made and entered on June 3, 1924, and the injunction thereby granted and ordered be reversed and set aside, in each and every particular respect, and that said Court be thereunto ordered to enter a decree ordering and adjudging the said Roberti letters patent to be void and not to have been infringed by these defendants, and that the bill of complaint in this cause be dismissed at the cost and expense of plaintiffs, and for such other and further relief and such further proceedings in this Court as by the Honorable United States Circuit Court of Appeals for the Ninth Circuit may be found meet and proper and may be [74] ordered. All of which is respectfully submitted.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,  
Solicitors and Counsel for Defendants.

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Assignment of Errors. Filed Jul. 2, 1924. Chas N. Williams, Clerk. By L. J. Cordes, Deputy Clerk.

Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [75]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, defendants in the above-entitled suit, in the penal sum of Two Hundred Fifty Dollars (\$250.00) to be paid to said August Roberti, Jr., and Edward L. Roberti, their successors and assigns, which payment well and truly to be made the Maryland Casualty Company binds itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 3d day of July, 1924.

The condition of the above obligation is such that whereas the said defendants of the above-entitled suit, are to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 3d day of June, 1924, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause, by which infringement by defendants was found [76] of plaintiff's letters patent and particularly as to claims 2 and 3 thereof, and whereby an injunction was ordered and costs allowed plaintiffs.

NOW, THEREFORE, the condition of the above obligation is such that if said J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob J. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the signature of said principal is hereunto affixed and the corporate name of said surety is hereunto affixed and attested by its duly authorized attorneys-in-fact, and the seal of said surety is hereunto affixed, at Los Angeles, California, this 3d day of July, 1924.

The first year's premium on this bond is \$10.00.

MARYLAND CASUALTY COMPANY.

[Seal]

By PIERCE J. DEASY,

Attorney-in-fact.

State of California,

County of Los Angeles,—ss.

On this 3d day of July, in the year one thousand nine hundred and twenty-four, before me, Mary C. Fausony, a notary public, personally appeared Pierce J. Deasy, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Maryland Casualty Company, and acknowledged to me that he subscribed the name of the Maryland Casualty Company thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

[Seal]

MARY C. FAUSONY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 18, 1928. [77]

Approved as to form, as provided in Rule 29.

FRANK L. A. GRAHAM,

FORD W. HARRIS,

Solicitors for Plaintiff.

I hereby approve the foregoing bond, 3d day of July, 1294.

WM. P. JAMES,

Judge or Clerk.

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al, Plaintiffs, vs. J. H. Jonas et al., Defendants. Bond on Appeal. Filed Jul 3, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [78]

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In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs-Appellees,

vs.

J. H. JONAS et al.,

Defendants-Appellants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Court:

Please prepare and certify transcript of record on appeal in the above-entitled cause, in accordance with the annexed stipulation and order filed herewith, and certify the same to the United States Circuit Court of Appeals for the Ninth Circuit, pur-

suant to the order of this Court allowing appeal herein, together with all the exhibits in this case.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants-Appellants.

[79]

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In the United States District Court, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs-Appellees,

vs.

J. H. JONAS et al.,

Defendants-Appellants.

STIPULATION AS TO TRANSCRIPT OF  
RECORD ON APPEAL AND EXHIBITS.

Defendants having taken an appeal in this suit to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree of June 3, 1924,

IT IS HEREBY STIPULATED AND AGREED :

Both parties to this suit so desiring, the provisions of Equity Rules 75, 76 and 77, excepting the second paragraph of Rule 76, promulgated by the United States Supreme Court, applicable to appeals are hereby waived; that the testimony in this cause be reproduced for the transcript in question and

answer form, to preserve the exact form and substance of the same; and that the reporter who reported the proceedings on the trial herein, file with the Clerk of this Court, for the transcript, and to be part thereof, at the expense of the defendants, a certified copy of the testimony and proceedings adduced at the trial and in the exact form so reported.

That the transcript shall further include a true and correct copy of all the appeal papers, this stipulation, and the order of the Court hereon, and the following papers and records in this cause on file in the office of the Clerk of this Court, to wit:

The bill of complaint herein; the answer of defendants; plaintiffs' interrogatories; answers to plaintiffs' interrogatories; order allowing amendment of defendants' answer on condition [80] that defendants pay cost of taking depositions; reporter's fees, etc.; amendment to answer of defendants Oct. 1, 1923; notice and motion for bill of particulars; order of November 19, 1923, granting motion for bill of particulars, etc.; bill of particulars of plaintiffs; petition for leave to amend answer filed with notice of motion to amend answer, dated December 14, 1923; order granting motion to amend answer and continue for hearing upon terms, etc., entered December 17, 1923; order for entry of interlocutory decree, dated June 3, 1924; memorandum opinion of June 3, 1924; interlocutory decree filed June 5, 1924; writ of injunction issued June 6, 1924; permanent injunction filed June 13, 1924; petition for order allowing appeal; order allowing appeal

and fixing amount of bond; assignments of error; bond on appeal; praecipe for transcript of record; stipulation as to transcript of record and exhibits; citation; and all orders extending time to docket cause and file record.

All the above shall constitute, together with book of exhibits hereinafter mentioned, the transcript of record of said cause on appeal, upon which record said appeal shall be heard and determined, which transcript, except said book of exhibits, shall be certified by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit.

**IT IS FURTHER STIPULATED AND AGREED:**

That all the physical and documentary exhibits filed by either party herein, save Plaintiffs' Exhibit 4 and Defendants' Exhibit "U" shall be forthwith transmitted by the Clerk of this Court at the expense of defendants, to the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, for use in said appeal, and that the appellants may be relieved from printing the original documentary exhibits in this case, including plaintiffs-appellees' exhibits 1, 2, 5, 6, 7, 8 [81] and 10; and defendants-appellants' exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "T"; provided the appellants appropriately arrange and bind said original documentary exhibits



in convenient form with pages numbered and indexed, for the consideration of the Court.

RAYMOND IVES BLAKESLEE,  
J. CALVIN BROWN,

Solicitors and Counsel for Defendants-Appellants.

FRANK L. A. GRAHAM,

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Solicitors and Counsel for Plaintiffs-Appellees.

It is so ordered this 17 day of December, 1924.

WM. P. JAMES,

United States District Judge, Southern District of  
California.

[Endorsed]: No. G-79—In Equity. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs-Appellees, vs. J. H. Jonas et al., Defendants-Appellants. Praeceptum and Stipulation as to Transcript of Record on Appeal and Exhibits, Filed Dec. 19, 1924. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727-30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants-Appellants. [82]

In the United States District Court, Southern  
District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing typewritten pages, numbered from 1 to 82, inclusive, comprised in one volume, and a second volume, numbered from 1 to 325, inclusive, to be full, true and correct copies of the following:

Bill of complaint;

Answer;

Plaintiffs' interrogatories;

Answers to Plaintiffs' interrogatories;

Order allowing amendment of defendants' answer on condition that defendants pay cost of taking depositions, reporter's fees, etc.;

Amendment to answer of defendants, including notice;

Notice and motion for bill of particulars;

Order of November 19, 1923, granting motion for bill of particulars, etc.;

Bill of particulars of plaintiffs;

Petition for leave to amend answer, filed with notice of motion to amend answer, dated December 14, 1923;

Order granting motion to amend answer and continuing for hearing upon terms, etc., entered December 17th, 1923;

Order for entry of interlocutory decree, dated June 3, 1924;

Memorandum opinion of June 3, 1924;

Interlocutory decree filed June 5, 1924;

Permanent injunction, issued June 6, 1924, and filed June 13, 1924;

Reporter's transcript of testimony and proceedings on trial;

Petition for order allowing appeal;

Order allowing appeal and fixing amount of bond;

Assignment of errors; [83]

Bond on appeal, and

Praeceptum for transcript of record, including stipulation as to transcript of record and exhibits,—

and that the same together constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause. Said record also contains the original citation.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the

foregoing record on appeal amount to \$95.25, and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of December, in the year of our Lord one thousand nine hundred and twenty-four, and of our Independence the one hundred and forty-ninth.

[Seal]

CHAS. N. WILLIAMS,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By R. S. Zimmerman,  
Deputy Clerk. [84]

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[1] In the District Court of the United States for  
the Southern District of California, South-  
ern Division.

Before Hon. WILLIAM P. JAMES, Judge Pre-  
siding.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

Filed Dec. 22, 1924. Chas. N. Williams, Clerk.  
By R. S. Zimmerman, Deputy Clerk.

Los Angeles, California, February 5, 6 and 7, 1924.

[1½] In the District Court of the United States  
for the Southern District of California, South-  
ern Division.

Before Hon. WILLIAM P. JAMES, Judge Pre-  
siding.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L.  
ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

APPEARANCES:

For the Plaintiffs: Messrs. GRAHAM & HARRIS.

For the Defendants: Messrs. BLAKESLEE &  
BROWN.

Los Angeles, California, February 5, 6 and 7, 1924.

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[2] Los Angeles California, Tuesday, February 5,  
1924, 10 A. M.

The COURT.—Roberti vs. Jonas.

Mr. GRAHAM.—Ready.

Mr. BROWN.—Ready.

The COURT.—Proceed.

Mr. GRAHAM.—If your Honor please, this is a suit for infringement of patent. This patent is on a non-stretching and ventilated mattress, the invention of August Roberti, Jr., and Edward L. Roberti, the patent being granted April 25, 1916.

The bill of complaint, in addition to the allegation respecting infringement, also charges unfair competition.

To give a little outline of the history of this case: A motion was made to dismiss the bill on the ground of improper joinder of the charges of infringement and unfair competition. We stated at that time that the charge of unfair competition was not relied upon as a separate cause of action but simply as showing aggravation of the charge of infringement. The motion to dismiss was denied.

Now, this invention is a meritorious one. It is not a suit on what we can call a paper patent, but it is a suit on a patent the invention of which has gone [3] into widespread use not only by the plaintiffs in the case, who are the inventors and patentees, but also by a number of licensees. Ever since the issuance of the patent these mattresses have been manufactured and sold.



To understand this invention I think it would be well to call the Court's attention to the ordinary form of mattress, which we know as a tufted mattress, that is, a mattress having outside tufts consisting of small buttons of leather or other material, the mattress being sewed entirely through from one side to the other, and through these tufts, by what we call ties consisting of twine or similar material. These ties are knotted on the outside of the tufts, and the tufts being pulled together by the ties give the tufted appearance or uneven surface to the mattress as commonly made. Now, that form of mattress is objectionable for several reasons, the principal reason we can state briefly being that these tufts are easily broken off and that they also form dirt-catchers where dirt and lint accumulate in these depressed portions where the mattress is tufted. The invention in suit has entirely done away with the outside tufts, and this invention, by the peculiar construction of the mattress, has permitted a new mode or a new method to be employed in making the mattress.

[4] In the upper and lower tick (exhibiting model to Court)—and this is merely for the purpose of explaining the mattress—are placed a number of eyelets. These eyelets are so arranged that they come directly over these shall strips or tabs on the interior of the mattress. Now, that tick is entirely filled with the filling, whatever it is desired to use, and after the tick is filled the sewing operation or the tufting operation takes place. That is done by passing a mattress needle

threaded with the tie through these eyelets. Passing through these eyelets the tie goes through these tabs or strips on the inside, going through the filling between the tabs or strips and out through the eyelet on the bottom of the tick. The needle is then passed upward and passes through the lower and upper tabs and the filling and out at the top.

If your Honor will look at the patent to Roberti which I have placed before you, this view, marked Fig. 2, is possibly not as plain to your Honor as to the mattress maker, so I will explain it. That filling is passed into the tick from this end. These tabs are stitched along the edge and are free at this end, so that when that filling is pushed into the mattress they are pushed down flat under these eyelets, so that when the needle is passed through the needle passes [5] through the tab or strip here and also through the tab or strip at the bottom. The needle is then brought up by the mattress maker and a knot is made on the tie and it is then pulled so that the tabs extend into the filling and is fastened together in that position by means of the tie, the ends of the tise being severed.

That figure shows, in a general way, the operation of making the tie and filling the mattress. Now, with that construction the appearance of the mattress is practically flat when compared with what we know or what we have called generally the old style or tufted mattress. We claim that the Roberti patent is basic in that character, that it provides a new method of filling the mattress and tying it. The eyelets also add to the mattress

the ventilating feature through the small openings wherever the eyelets occur.

Now, in the patent there are a number of advantages set forth due to this new construction. They are found on the first page of the specifications, beginning with line 10 and extending to line 53. I will just call your Honor's attention to those in a general way. The first one is that the mattress will permanently retain its shape without spreading due to the flattening of the tufting. In making a mattress under the old method I understand that it is necessary to make an extra allowance for the tufting, or the goods that is [6] taken up by that portion of the tick which is tufted. That is not necessary in making a mattress under the Roberti patent.

The second object refers to the ventilating spaces.

The third object is to do away with the external tufts common to the ordinary form of mattress and substitute a flat surface.

The fourth object is to provide tufting means or tie members between the upper and lower tick which are entirely concealed within the mattress and entirely protected.

The fifth object is to provide a tufting or tie means which will secure the filling against lateral displacement or shifting within the tick; that is, the tabs or strips extending into the filling and the ties connecting the tabs or strips preventing the lateral movement of the filling.

The sixth object is to provide a reinforcement of the tick so that relatively cheap material can

be used without danger of the tick wearing or stretching; and

The seventh object is to provide a mattress having a flat surface of even thickness so that full elasticity of filling is utilized and maintained.

Now, the defendants admit in their bill of complaint that they are engaged in the manufacture and sale of a [7] Mattress made under the Malerstein patent. This Malerstein patent has the eyelets and the concealed ties. In Fig. 6 is shown the tie after the building of the mattress, the tie being wholly within the mattress and concealed, and it shows the tie connected to these tabs or strips which are fastened on the inside of the mattress. In that patent, however, your Honor will notice that the ties pass around the crossed strips. We find that in the actual manufacture of that mattress the ties do not in all instances pass around those strips, but in some instances pass through them, and we will introduce one of the mattresses to show that difference.

At this time I want to call your Honor's attention to the claims; but before I speak of that I want to mention the fact that it is well known in patent law that a defense of using a later patent, or of the invention disclosed in a later patent, does not in any sense affect the question of infringement. If at all, it simply raises a presumption that there is a patentable difference in the construction shown in the later patent from that shown in the first patent. The question of infringement does not enter into the question when the

second patent is applied for and acted upon by the Patent Office. In other words, when an application for patent is made the Patent [8] Office never considers the claims in the prior patents to see whether or not the invention shown in the later patent or the later application is an infringement of any earlier patent. The question the Patent Office passes upon is whether the application shows something that is new, something that is useful and something that amounts to more than mechanical skill. In other words, it must show invention. The question of whether or not it is new is passed on by an examination of the prior patents to see whether the construction disclosed in the application is shown in the earlier patents. The question whether it is useful is very rarely raised by the Patent Office, as all constructions usually have some useful character. The question whether it is invention or not is not affected by the question of whether it infringes the prior patent. So that the fact that the defendant comes into court and says that he is making mattresses under a later patent does not have any bearing on the question of infringement.

I am not going over all the claims at this time; I simply want to call your Honor's attention to the first claim in the patent, which reads as follows:

“A mattress comprising an upper tick member—” That is the upper surface or the upper sheet of material forming the upper part of the mattress [9] (exhibiting model). “—a lower

tick member; a boxing (which is the side of the mattress) secured to the side members in such manner as to form an enclosed tick. Filling for the tick." (That is any kind of filling that may be used.) "Ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points." (They are the ties which consist of the twine connecting the tabs or strips which are fastened to the upper and lower tick members.) "And eyelets in said tick members through which said ties may be put in place."

That is the broadest claim of the patent; the other claims are not as broad, and use the term "tabs." That is, the ties are secured to the tabs fastened to the upper and lower tick members.

We claim an infringement of all of the claims of the patent.

Mr. BROWN.—If the Court please, the defendants herein deny any infringement, and that will be our main contention.

A further contention will be that the plaintiffs herein obtained the matter for their said patent surreptitiously or unjustly from others, and we have alleged in our answer that such others are William Daniel and Joseph Avrill.

[10] We have also pleaded the prior art as showing certain structures in the prior art to prove to the Court that the invention of both of the Robertis was not generic, but specific; in other words, that it was a mere improvement over something that went before.

We have also denied any acts of unfair competition or any violation of any trademark, whether registered in the United States Patent Office or common-law trademark.

At this time I again urge our motion to dismiss that portion of the complaint which relates to unfair competition and to alleged trademark infringement, on the basis that this court has no jurisdiction over said matter. That was urged before, and I urge it again, and my reason for doing so is that a United States District Court has no jurisdiction over matters other than are specified in Section 34 of the Judicial Code. (Citing *Elgin National Watch Co. vs. Ill. Watch Case Co.*, 179 U. S. 665, and reading therefrom.)

The COURT.—It seems to me that in the Woolwine Metal Products case which was tried in Judge Bledsoe's department the issue of unfair competition was presented along with the patent issue.

Mr. BLAKESLEE.—In that case it is true that in the supplemental bill that is pleaded along with the infringement, as an aggravation.

[11] The COURT.—Yes. That is all they claim for it here, I understand.

Mr. BROWN.—Well, that may be, but they have also joined with the patent infringement trademark infringement. It might be a common-law trademark, and my contention is that the jurisdiction of a District Court of the United States being a limited one it cannot be expanded to include other matters over which it has no jurisdiction with those over which it has jurisdiction, and the Supreme

Court in the Elgin National Watch Co. case has passed directly upon that question.

Mr. BLAKESLEE.—There was no trademark issue in that other case.

The COURT.—No.

Mr. BROWN.—Now, the parties to this suit, namely, Edward and August Roberti, as well as Mr. Jonas and others, are residents of this state. [There is no diversity of citizenship, and there is no allegation in the complaint that the amount is over \$3,000, which is absolutely essential.

As to trademark, the Supreme Court of the United States has also passed on that in a case reported in 201 U. S. at page 166, as follows: (Reading.)

I originally argued this motion to dismiss before Judge Bledsoe. It is true that in a case some time [12] previously, the Hadden Automatic Sprinkler vs. Hadden case, we alleged infringement of the patent and unfair competition, and in the argument when that case was presented I argued to Judge Bledsoe that unfair competition and patent infringement could be joined on the ground that unfair competition was an aggravation of patent infringement. Mr. Lyon opposed the motion, and the motion was denied,—that is, it was granted to the plaintiffs. At that time I had only consulted certain authorities, and some two or three weeks later I was consulting some Supreme Court authorities and I read this Elgin National Watch Co. case and came to the conclusion that my original contention as to the joinder of the two was erroneous, and



that it should not be permitted, and I so argued before Judge Bledsoe, but Judge Bledsoe—apparently in the argument I did not make myself clear—held that this particular case involved not only unfair competition but was attempting to inject something else in violation of the trademark law. I was going to ask the Court to pass upon the similarity of words, and my contention is that it was wrong. But it is evident that I did not make myself clear to Judge Bledsoe as to what I was attempting to do and he was of the opinion that I was rearguing my case of unfair competition and patent infringement, which was not strictly true.

[13] I repeat that I believe this court is without jurisdiction within section 24 of the Judicial Code and within the cases I have cited.

Our further contention in our answer is this case will be that neither Mr. Edward Roberti nor Mr. August Roberti really invented anything; that what Mr. August Roberti did was to surreptitiously obtain the conception of the invention from one William Daniel; that Mr. Edward Roberti, if he had any conception of an invention, or any idea, obtained it from Mr. Joseph Avrill; that the two of them combined their idea and the patent matured therefrom. Mr. Daniel filed an application for patent some twenty-two months before any alleged conception by either of the Robertis, as the preliminary statements will show which I will introduce into evidence later. The Roberti patent was involved in interference with one Joseph Av-

rill, and they both filed preliminary statements on the matter.

We also urge, if this Court denies the motion to dismiss the complaint as to those portions involving unfair competition and violation of trademark, that there has been no act of unfair competition on the part of the defendants or any of them, and that there is no similarity between the words "Sanotuf" and "Tiednotuff," either in color, size, appearance or sound, and that the word "Restmore" or "Restamore" [14] means merely a species of mattress manufacture, which is simply to determine the grade of mattress, and we will show that those words are old, by depositions we have taken in the east.

Mr. GRAHAM.—With respect to the motion to dismiss, if your Honor please, that matter was argued at length in this same case before Judge Bledsoe and has been passed upon. At that time we cited a number of cases in which the joinder of unfair competition and patent infringement has been made in the bill of complaint and sustained by the Court. The distinguishing feature in those cases, to my mind, is this—that where the acts of unfair competition are so intimately associated with the acts of infringement that they are in fact substantially the same act then it is perfectly proper to join the unfair competition and infringement; and where it pertains to the actual marking and the manner of marking the very goods which are complained of as being an infringement, in those cases

I believe the law is quite plain that a joinder of that kind is proper.

The COURT.—That is, it may be used as an aid in furthering the marketing of the infringing device.

Mr. GRAHAM.—Yes. Now if, for instance, the defendant were making mattresses that infringed plaintiffs' patent, and they were also making another [15] line of goods, we will say some kind of furniture, and plaintiff was making that same line of furniture, and there were acts of unfair competition which related solely to furniture and which had no relation to the patent, that, to my mind, would be a different proposition; but where the acts relate to and are so connected that they relate to the same article which is claimed to infringe, then it is substantially one operation or one transaction.

The case of *Ross vs. Geary*, 188 Fed. 731, related to the uniting of a charge of infringement of a trademark and other acts of unfair competition, and the Court said that when the wrongful acts are not separate and distinct but are all taken together as one whole or one act then the facts may be alleged and proved and the wrongful acts enjoined.

The COURT.—It is understood that the motion to dismiss is now renewed on the grounds stated. At this time I will deny the motion; not intending, however, to foreclose you upon the argument from suggesting the application of the evidence and what is to be considered when I give judgment.

Mr. GRAHAM.—I will ask Mr. Roberti to take the stand.

TESTIMONY OF EDWARD L. ROBERTI, FOR  
PLAINTIFFS.

[16] EDWARD L. ROBERTI, plaintiff herein, having been first duly sworn as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Mr. GRAHAM.—We offer in evidence a certified copy of the patent in suit, 1,180,432, granted April 25, 1916, to August Roberti, Jr., and Edward L. Roberti, for improvement in non-stretching ventilated mattress.

(Plaintiffs' Exhibit No. 1.)

Q. Please state your name.

A. Edward L. Roberti.

Q. Mr. Roberti, you reside in the City of Los Angeles, do you?     A. I do.

Q. Are you one of the patentees of the patent in suit?     A. I am.

Q. At the time of the bringing of this suit who were the owners of that patent?

Mr. BLAKESLEE.—We object to that as calling for a conclusion of the witness on a matter of law. We think the proper proof should be made on the subject of title. The witness may be asked if he assigned any interest, but to ask who was the owner is calling [17] for a legal conclusion.

Mr. GRAHAM.—The question is withdrawn.

Q. This patent shows on its face that it was granted to August Roberti, Jr., and Edward L.

(Testimony of Edward L. Roberti.)

Roberti. Have you at any time prior to the bringing of suit assigned any interest in this patent?

A. No.

Q. How long have you been in the business of making mattresses, Mr. Roberti?

A. About 22 years, I think. Between 22 and 23 years.

Q. And where is your place of business?

A. No. 1346 Long Beach Avenue, Los Angeles.

Q. Have you ever adopted any names or marks for your mattresses? A. Yes.

Q. What are those names?

Mr. BLAKESLEE.—We wish to reserve an objection to this entire line of testimony subject to the ruling of the Court.

The COURT.—Yes; the objection is overruled and an exception may be shown.

A. We have five or six names for different grades of mattresses. We have one mattress by the name of "Sunrise"; and "Restmore"; "Downo"; "Standard"; "Superior"; and "Hairfelt"; and we have several others.

[18] Q. Have you used any name on the mattress made by you like the mattress shown in the patent in suit?

A. Yes; we are using the names "Restmore," "Downo," "Standard," "Superior" and "Kapot."

Q. Have you used any general name for all of these different named mattresses?

A. We have used our trademark name of "Sanotuf."

(Testimony of Edward L. Roberti.)

Q. Now, when did you first use the word "Sanotuf"?

A. I don't just recall the date. I think I will have to refresh my recollection here (examining papers taken from pocket). Our registration of "Sanotuf" was about June 1, 1915.

Q. What is that you refer to?

A. This is our United States registration of trademark.

Q. And does that contain something that refreshes your recollection as to the date?

A. Yes; I couldn't remember, without looking at this, the exact date.

Q. Now, when did you start to use the word "Restmore"?

A. The only evidence I have of that is by looking up some of our price lists and finding some of our price lists back as far as 1912.

Q. To what extent has the word "Sanotuf" been used?

[19] A. It has been used on practically our whole product of mattresses.

Q. Well, upon what mattresses have you used the word "Sanotuf"?

A. The names I have mentioned formerly there.

Q. Are those mattresses all of the same construction?

A. All of the same construction, with different fillings. The names I gave you there were the names of the filling contained in the mattresses.

Q. What territory do you cover in the sale of

(Testimony of Edward L. Roberti.)

these mattresses under the names you have mentioned?

A. California and Arizona principally.

Q. Have you advertised these mattresses under that name? A. Yes.

Q. To what extent has this advertising been done?

A. As nearly as I can take it from our books, we have spent about \$30,000 in advertising since we have had the patent that has been issued.

Q. Have you any licensees under the patent in suit? A. At the present time we have six.

Q. And where are they located, speaking generally?

A. (Referring to paper.) We have one in Colorado; one in Milwaukee; one in Washington; Oregon; [20] Utah, and Idaho, and Northern California.

Q. What is that paper which you have referred to? A. That is a record of our books.

Q. Taken from your books of account?

A. Yes.

Q. Can you state, in round numbers, the number of mattresses that you and your licensees have made like that of the patent in suit?

A. Somewhere about 75,000.

Q. Now have you marked those mattresses made like the patent in suit with notice of the patent?

A. We do.

Q. Have you marked all of them with notice of patent since the patent issued? A. Yes, sir.

Q. How about your licensees?

(Testimony of Edward L. Roberti.)

Mr. BLAKESLEE.—We object to that as assuming a fact not testified to, and this objection might have been made previously. There is no testimony of any license, and no license has been pleaded; and inasmuch as the question of licensees goes to acquiescence in a patent we think it should be proven in the usual way and not assumed in a question.

Mr. GRAHAM.—We are not attempting to prove the licenses for that purpose; we are attempting simply to show the amount or number of mattresses that have [21] been made, and I think the question is proper for that purpose.

Mr. BLAKESLEE.—The question should not assume there has been a license when there is no proof of it.

(Last question read.)

The COURT.—He may answer if he knows.

A. Under our contract with them they are authorized to put the name "Sanotuf" on the mattress and also a license tag which bears the name "Sanotuf."

Mr. BLAKESLEE.—We wish to move to strike out the answer as assuming facts not testified to and not proven, inasmuch as this license question has a strong bearing on the question of acquiescence in the patent.

The COURT.—The motion is denied.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Mr. Roberti, I hand you a label and ask you what that refers to.



(Testimony of Edward L. Roberti.)

A. That is a label which we put on our "Sanotuf" mattresses.

Mr. GRAHAM.—We offer the label in evidence.

The COURT.—It may be filed.

(Plaintiffs' Exhibit No. 2.)

Q. (By Mr. GRAHAM.) Do you have any mattress made by the defendant in your possession?

A. We have one.

Mr. BLAKESLEE.—We object to that as assuming [22] facts certainly not proven.

The COURT.—Yes.

Mr. GRAHAM.—Well, I will show the defendants' counsel a mattress and ask them if they will admit that is one of the mattresses made by the defendants (exhibiting mattress). That will save time and a lot of proof.

Mr. BROWN.—We don't know anything about the mattress. All mattresses look alike to a certain extent, and we don't know the construction of the interior.

Q. (By Mr. GRAHAM.) I show you this mattress right here, Mr. Roberti, and will ask you to tell us what you know about it, and, if it has ever been in your possession, how it came into your possession.

A. We had that mattress bought from the J. H. Jonas Company for the purpose of examining it to see to what extent it was infringing upon our mattress.

Mr. BLAKESLEE.—We move to strike out that answer inasmuch as the witness has not testified as

(Testimony of Edward L. Roberti.)

to any act of his own in the purchase of this mattress. The proof should be made by some person who procured or bought it.

The COURT.—Yes, that is true. It would be hearsay otherwise.

Mr. GRAHAM.—I am only asking this witness to [23] testify as to his possession of the mattress, and the actual purchase of the mattress I will prove by another witness.

Q. How did you obtain possession of this?

The COURT.—From whom, immediately, did you get it?

A. We bought the mattress from Kaufman Brothers.

Mr. BLAKESLEE.—We object to that as—

The COURT.—It is necessary to be somewhat technical about that. Did you get it yourself?

A. We had one of our men get it.

Q. All you know is that you received it from one of your men? A. Yes.

Mr. GRAHAM.—We will offer this mattress in evidence and simply ask at this time that it be marked for identification.

The COURT.—It may be marked for identification.

Mr. BLAKESLEE.—If counsel wishes to expose the interior of the mattress, which is really the important part, we do not wish to be supertechnical. That is the only thing that moves us to be careful. If he wishes to have it ripped open and will show us the inside of it and it seems to be our construc-

(Testimony of Edward L. Roberti.)

tion, we will stipulate to it, but we do not wish to stipulate to something that is sealed to our vision.

[24] (Mattress ripped open at end and exhibited to counsel for defendants.)

Mr. BLAKESLEE.—We will stipulate that is one of the defendants' mattresses.

Mr. GRAHAM.—We will offer that mattress in evidence as Plaintiffs' Exhibit No. 3.

The COURT.—It may be so marked.

Q. (By Mr. GRAHAM.) I show you another mattress and ask you if you know what that is.

A. That is our "Sanotuf" mattress.

Mr. GRAHAM.—We offer that mattress in evidence as Plaintiffs' Exhibit No. 4.

The COURT.—It may be marked.

Q. (By Mr. GRAHAM.) I will ask you, Mr. Witness, to open the side of that other mattress.

(Witness rips mattress open.)

Q. How long have you been in the business of making mattresses, Mr. Roberti?

A. 22 or 23 years.

Q. Are you thoroughly familiar with the construction of mattresses and different parts of them?

A. I am.

Q. Will you be kind enough to point out the parts of that mattress that are similar to the parts of defendants' mattress, Plaintiffs' Exhibit No. 3?

Mr. BLAKESLEE.—We object to that as not the [25] proper method of proof, and as calling for a conclusion of the witness and not for a statement of facts. The witness should describe both. Further-

(Testimony of Edward L. Roberti.)

more, it is immaterial in that a comparison of plaintiffs' mattress with defendants' mattress is not within the issues. The comparison should be made between the patent in suit and defendants' mattress, and there is no presumption to be indulged in that plaintiffs' mattress is made like the mattress of the patent in suit. It is not the proper method of proof.

The COURT.—You may point out, Mr. Witness, on your mattress any parts that you claim are described in the patent.

A. Well, I claim that the operation of tying the mattress down is exactly the same as the way we have our operation.

Mr. BLAKESLEE.—We move to strike that out as a conclusion of the witness.

Q. (By Mr. GRAHAM.) The Court said to point out the parts in your mattress that are found in your patent.

A. (Referring to Exhibit 4 and to patent.) A mattress comprising an upper and lower tick, and side boxing,—or it doesn't have to have side boxing unless it is necessary—filled with any kind of filling, and sewing a tab on the inside, or a flap or strap of some kind, on the inside of each, upper and [26] lower, member,—

Q. Show the Court these different parts you refer to.

A. Yes. You see, here is the strap that goes across, that creates the never-stretch feature of the mattress, and then the tab which receives the twine

(Testimony of Edward L. Roberti.)

through the eyelet, which brings the mattress to a uniform thickness. Those are the main claims that we feel we are entitled to.

Mr. BLAKESLEE.—We move to strike out the last statement as a voluntary statement and not a statement of facts.

The COURT.—I suppose he means those are the points of similarity between that mattress and this patent.

The WITNESS.—Yes.

Q. (By Mr. GRAHAM.) In other words, those parts you have described are the parts described in the patent? A. Yes.

Q. The upper tick member, the lower tick member, the boxing, the ties and the fastening of those ties to the upper and lower tick member, on the inside of the tick. Is that correct?

A. Yes; to receive the twine from the outside of the tick after the mattress has been filled, so [27] that we have an invisible tufting.

Q. Now, will you look at defendants' mattress and point out the features in that that you find in your mattress?

Mr. BLAKESLEE.—We object to that as immaterial. The question is what is in the patent and what is in defendants' mattress, if anything. That is the issue here.

The COURT.—Of course it is the same thing. If he has correctly described the things he finds in his mattress, and whether he compares it with

(Testimony of Edward L. Roberti.)

what he has just described, and if his first description shows the identity. Proceed.

A. This mattress has the upper and lower tick members and the boxing, the same as ours, and it has the ties on the inside, and the never-stretch strap which goes across, and, as I mentioned before, it has the ties on the inside fastened to the upper and lower tick members to receive the twine which enters through the eyelets in order to tuft the mattress to a uniform thickness; and it has exactly the same operation as our mattress.

Mr. BLAKESLEE.—We move to strike that out as a conclusion, and move to strike out the whole answer, on the ground that the patent speaks for itself and the defendants' mattress speaks for itself and the mere [28] attempt to reach a conclusion that they are the same is not the proper method of proof. The devices of the patents speak for themselves anyway and mere oral testimony in that behalf cannot prove anything.

The COURT.—I think as a mattress man he can tell at least whether the operation of constructing the mattress would be the same in the two—that is, under his patent and under the exhibit.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Now, will you take a copy of the patent in suit and point out similarities in defendants' mattress Exhibit No. 3?

Mr. BLAKESLEE.—Same objection.

The COURT.—Yes.

A. From this patent I see the same features on

(Testimony of Edward L. Roberti.)

the inside construction as what are noted in this patent.

The COURT.—Referring to your own patent as you call it?

A. Yes. I have a copy of my own patent in my hand. I see that the pads on the inside are sewed to the upper and lower members of the tick, and they have the same twine sewing them through the eyelets, which draws the mattress to a uniform thickness, the same as our patent.

Mr. BLAKESLEE.—We move to strike that out, [29] particularly the part that states it is the same as in the patent, as a self-serving statement and conclusion and not a statement of fact and not the proper method of proof.

The COURT.—I think I will allow it to remain in. The objects are here and we can judge of that.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Now, do you find in defendants' mattress, which you are looking at, an upper tick member? A. I do.

Q. And a lower tick member? A. I do.

Q. And boxing secured by those members?

A. I do.

Q. In such manner as to form a closed tick?

A. I do.

Q. Do you find filling for said tick? A. I do.

Q. Do you find ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points? A. I do.

(Testimony of Edward L. Roberti.)

Q. Eyelets in the tick members through which the ties may be put in place? A. I do.

[30] Q. Now, do you find tabs in this defendants' mattress?

A. There are strips that are put into loops which act for the same purpose.

Mr. GRAHAM.—We offer in evidence at this time, if your Honor please, a carbon copy of a letter written to J. H. Jonas & Sons, 5805 South Park Avenue, by the firm of Graham & Harris, calling their attention to the ownership of the patent in suit and the fact that they are infringing the patent. I understand there is no objection to that copy being offered.

The COURT.—Very well.

(Plaintiffs' Exhibit No. 5.)

Mr. GRAHAM.—You may take the witness.

Mr. BLAKESLEE.—No cross-examination.

### TESTIMONY OF FRED W. WIDER, FOR PLAINTIFFS.

[31] FRED W. WIDER, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. Fred W. Wider.

Q. What is your business?

A. Furniture business.



(Testimony of Fred W. Wider.)

Q. Where are you located?

A. No. 2110 Sunset.

Q. Do you handle mattresses and articles of that kind in your business? A. Yes, sir.

Q. Have you had any dealings with the defendants J. H. Jonas & Sons? A. I have not.

Q. Have you ever had any dealings with them at all? A. No, sir.

Q. Have you ever had any conversation with them? A. Yes, sir.

Q. With whom did you have such a conversation?

A. Jonas, Jr. I expect it was him; he said it [32] was.

Q. And where did that conversation take place?

A. At my store.

Q. Was there anyone else present?

A. Not that I can recall.

Q. What was that conversation?

A. He came in to sell mattresses.

Q. Well, relate the conversation as nearly as you can remember it.

A. He came in one day and wanted to know if I wouldn't buy some "Sanotuf" mattresses. I said to him "Sanotufs"? He said, "Yes." Well, I told him I supposed Roberti Brothers were the only ones that made the "Sanotuf." "Well," he said, "Ours is just like it." And I said "Under the same name?" And he said "No, we call our mattress the 'Tiednotuff.'"

Q. And he made the statement to you that their

(Testimony of Fred W. Wider.)

mattress was just like the "Sanotuf" made by Roberti Brothers?      A. Yes, sir.

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. When did you say this conversation took place?      A. It must have been a year ago.

Q. Do you remember the month?

[33] A. No, sir. He was in several times; not only once.

Q. Came into your place of business?

A. Yes, sir.

Q. Do you remember at which of these several times that statement was made?

A. He called it "Sanotuf" at least three times—at least two or three times. He came in and wanted to know if we wanted to buy "Sanotuf" mattresses.

Q. Do you mean Mr. Jonas, the defendant?

A. Well, Mr. Jr. That is, he said he was the Jr.

Q. Had you met Mr. Jonas before that time?

A. No, sir.

Q. Is he in the room here to-day? Do you see him?      A. I do not see him.

Q. Do you know that it was Mr. Jonas's son?

A. Only from what he said.

Q. You have never seen him at the place of business of the defendants, have you?

A. No, sir.

Q. Have you ever been there?      A. No, sir.

(Testimony of Fred W. Wider.)

Q. Do you know the salesmen of the plaintiffs, the Roberti people? [34] A. I do.

Q. All of them?

A. I know the salesman Mr. Dort.

Q. Did you transact any business with this man who said he was Jonas, Jr.?

A. No, sir; I never bought from him.

Q. Did you believe that the defendant was selling the same kind of mattresses?

A. I didn't consider it at all.

Q. You didn't act on it at all, did you?

A. No, sir.

Q. You didn't utilize his statement in any way in your business or make any purchase or do anything at all?

A. I did not. That is, I never bought from him.

Q. As far as you actually know that might have been somebody else besides Jonas, Jr., might it not?

A. It might have been. He told me he was Jonas, and that is all I know. I never had been introduced to him.

Mr. BLAKESLEE.—We move to strike out that testimony as merely hearsay unless it can be connected up in some way.

Mr. GRAHAM.—This Jonas, Jr., is one of the defendants in the suit.

Mr. BLAKESLEE.—Anybody might represent the [35] defendant.

Mr. BROWN.—It was after the commencement of the suit, something like a year ago.

(Testimony of Fred W. Wider.)

Q. (By the COURT.) Would you know the person if you saw him?

A. Why, I believe so. It was over a year ago since he was in. He did call several times, and I told him there was no need of calling because I wouldn't buy his goods.

Q. (By Mr. BLAKESLEE.) Can you describe him?

A. He was a Jewish man, the same as—a great many of them look alike.

Q. Well, what was his height?

A. Slim, and medium tall,—

Q. Smooth face? A. I believe so.

Q. You don't remember?

A. Not exactly, no. That is a year ago.

Q. You would know him if you saw him?

A. I think I would.

Mr. BLAKESLEE.—We move to strike out the testimony as not establishing any definite identity.

The COURT.—It will be allowed to remain in subject to its being shown that the person was the person he represented himself to be.

Mr. GRAHAM.—Will counsel have Mr. Jonas, Jr., [36] in court this afternoon?

Mr. BLAKESLEE.—Yes, we will have him here this afternoon.

Mr. GRAHAM.—I will ask Mr. Silk to take the stand.

TESTIMONY OF ROBERT P. SILK, FOR  
PLAINTIFFS.

[37] ROBERT P. SILK, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. Robert P. Silk.

Q. What is your business?

A. Furniture business.

Q. Located in Los Angeles?      A. Yes, sir.

Q. Do you handle mattresses?      A. Yes, sir.

Q. Have you ever had any dealings with J. H. Jonas & Sons or any of their representatives?

A. We have bought other things from them besides mattresses.

Q. So that that you have had some actual business dealings with J. H. Jonas & Sons?

A. Yes, sir.

Q. Did you ever have any conversations with any of their representatives relating to mattresses?

A. Mr. Max Jonas has been in the store on several different occasions. He has asked me to put in his line that he called the "Tiednotuff" mattress.

[38] Q. This Mr. Max Jonas you refer to, is he the man who negotiated with you and sold you some of their goods that you mentioned in your previous answer?      A. Yes, sir.

(Testimony of Robert P. Silk.)

Q. What was the conversation relating to mattresses?

A. Max has been in the store several times asking me to put his mattresses in, and I asked him what kind of mattresses he had, and he said "We are putting out a new mattress that we call the 'Tiednotuff'"; and I says, "Do you handle a 'Sanotuf' mattress?" And he said, "Yes"; and he says, "This is the same as the 'Sanotuf.'" He even went further and says, "We are substituting the 'Tiednotuff' for the 'Sanotuf' if we are out of the other brand."

Q. And did you buy any of these mattresses?

A. No, sir.

Q. You are positive, however, that this man that made the representation to you about the "Tiednotuff" mattress that you have just testified to is the Max Jonas who sold you the goods for Jonas & Sons? A. Yes, sir.

Mr. GRAHAM.—That is all.

[39] Cross-examination.

(By Mr. BLAKESLEE.)

Q. When did these representations about "Tiednotuff" take place?

A. It was about a year ago, or possibly 14 months.

Q. What did you understand by the statement that the "Tiednotuff" was the same as the "Sanotuf"? Do you mean it was the same mattress and had filling in it, or how far did you understand it to be the same?

(Testimony of Robert P. Silk.)

A. The way he represented it to me was that the general appearance of the mattress was so similar that a person that wasn't versed in the technicalities of mattresses couldn't tell the difference between them.

Q. In other words the external appearance, the part you would see in looking at a complete mattress; is that it?     A. Yes.

Q. Now, isn't that true of most of the mattresses you handle as far as the make-up is concerned, that there is a tick and side walls and tufts?

A. No. Several mattresses have their distinguishing features. Mr. Roberti makes a mattress he calls the "Sanotuf"; that is different from the [40] other mattresses that have an eyelet in the tick.

Q. Did Mr. Max Jonas specify the eyelet when he spoke of the resemblance of the "Tiednotuff" mattress to the "Sanotuf"?

A. Yes, he said it was just the same.

Q. Did he mention the eyelets?

A. Well, no, he didn't mention the eyelets. He said it was a "Sanotuf" mattress.

Q. He didn't mention any details?

A. Yes, he said it was the same construction.

Q. He didn't mention any details specifically, any part of the construction, did he?     A. No.

Mr. BLAKESLEE.—That is all.

Mr. GRAHAM.—Plaintiff rests its *prima facie* case.

[41] Mr. BROWN.—In accordance with the answer filed pleading the prior art and also with reference to the defendants Daniel and Avrill, we wish at this time to introduce in evidence as Defendants' Exhibit "A" a certified copy of the file-wrapper and contents of the application of August Roberti and Edward L. Roberti. There has already been a copy introduced, but this is complete.

Mr. GRAHAM.—Does that Exhibit "A" include the copies of the patents?

Mr. BROWN.—No; just the actions of the Patent Office.

Likewise, as Exhibit "B," a certified copy of the file-wrapper and contents, not including the cuts, of the application of Joseph Avrill for improvements in mattresses, filed December 1, 1916, bearing serial number 134,472.

Mr. GRAHAM.—We object to the offer. The allegation in the answer respecting the Avrill defense is that the two Robertis surreptitiously or unjustly obtained a patent for the mattress of the patent in suit which was in fact the invention of another. Now, this in itself is not proof under that pleading; this is merely a certified copy of the application of Joseph Avrill and is not proof of invention.

Mr. BROWN.—It is merely one step, if the Court [42] please, which will be connected up with oral proof.

Mr. GRAHAM.—The materiality of it has not been shown at this time.



The COURT.—The objection is overruled.

Mr. GRAHAM.—Exception.

Mr. BROWN.—Likewise we offer a certified copy of the application for patent of Joseph Avrill filed in the United States Patent Office July 25, 1916, bearing serial number 111,163, as Defendants' Exhibit "C."

Also, as Defendants' Exhibit "D," I wish to introduce into evidence a certified copy of the file-wrapper and contents, not including patents cited, of the application of William R. Daniel filed February 25, 1913, serial number 750,512.

I also wish to offer in evidence at this time certified copy of the preliminary statement of Joseph Avrill, which Avrill was involved in interference with August Roberti and Edward L. Roberti at the time Mr. Avrill attempted to prosecute his case before the United States Patent Office, being an interference between Mr. Roberti's patent, which is now in suit, and Mr. Avrill's, patent application, as Defendants' Exhibit "E."

Likewise I offer in evidence the preliminary statement of August and Edward L. Roberti, as [43] Defendants' Exhibit "F."

We have also pleaded the prior art in our answer, and we have a stipulation as to the use of printed copies, but as we have obtained certified copies I will introduce those. As Defendants' Exhibit "G" we wish to introduce into evidence certified copy of the patent of Louisa Ashby, 545,445, granted June 23, 1921.

Also a certified copy of the patent to Charles W. Curlin, 691,118, granted January 14, 1902, as Defendants' Exhibit "H."

Also patent to Laban Heath, 274,495, granted March 27, 1883, as Defendants' Exhibit "I."

Also patent to John J. Lane, 622,239, granted April 4, 1889, as Defendants' Exhibit "J."

Also patent to Jacob Maas, 121,723, granted December 12, 1917, as Defendants' Exhibit "K."

Also patent to David Micon, 1,123,345, granted January 5, 1915, as Defendants' Exhibit "L."

Likewise, as showing the state of the prior art, and which patents are not specifically pleaded in the answer, we have five patents, namely:

Patent to Van Vorst et al., 1,138,264, dated May 4, 1915, which we offer as Defendants' Exhibit "M."

Likewise patent to Forwood, 881,851, dated March 10, 1908, as Defendants' Exhibit "N."

Also patent to Busche, 765,377, dated July 19, [44] 1904, as Defendants' Exhibit "O."

Also patent to Fournier, 624,638, dated May 9, 1899, as Defendants' Exhibit "P."

Also patent to Heffner, 1,029,928, dated June 18, 1912, as Defendants' Exhibit "Q."

Certain of the last five patents mentioned, which are introduced to show the state of the prior art, were cited by the Examiner during the prosecution of the Roberti patent, and others were cited in connection with the Daniel application for patent.

Mr. BLAKESLEE.—I will ask Mr. Malerstein to take the stand.

TESTIMONY OF HARRY J. MALERSTEIN,  
FOR DEFENDANTS.

[45] HARRY J. MALERSTEIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name.

A. Harry J. Malerstein.

Q. What is your occupation?

A. Mattress manufacturer.

Q. With what business are you connected?

A. Spiegel & Malerstein Bedding Company.

Q. Have you ever been connected with Jonas & Sons, the defendants? A. Yes, sir.

Q. When did you terminate that connection?

A. The first part of this year.

Q. I show you a copy of U. S. Patent No. 1,421,274 to H. J. Malerstein for mattress, issued June 27, 1922, and ask you if you are the Malerstein referred to in that patent. A. Yes, sir, I am.

Q. Did you at any time ever give Jonas & Sons, the defendants here, the right to use any invention covered by this patent in their business?

A. No; there wasn't any agreement on that, but I [46] intended—or it was always intended I would be a partner in the business.

Q. Well, did you permit them to use it?

A. On that grounds.

Q. When you were connected with them?

(Testimony of Harry J. Malerstein.)

A. On that grounds.

Q. And are they still using it, if you know?

A. Why, I guess they are.

Q. You haven't informed or notified them they must stop using it, have you?     A. Not yet.

Q. And did you permit them to use it at all times while you were connected with it?

A. As I say, on the grounds that I was to be a partner in the business.

Q. But that use was made with your permission?

A. Yes.

Q. Now, when did your connection with defendants start?

A. Oh, I have been connected with the defendants since 1917.

Q. Have you examined Plaintiff's Exhibit No. 3, this mattress?     A. Not closely.

Q. Will you please refer to it and make any comparison you can find to exist between the [47] construction of this Exhibit 3 and the construction shown in this patent of yours, No. 1,421,274?

A. Well, this patent shows a mattress having an outside cover consisting of an upper and a lower cover in connection with the boxing that is used on mattresses with the filling inside. It has ordinary filling; it can be cotton, or floss, or any desirable filling. It has loops running on the inside of the ticking both ways for reinforcing, in the lower ticking and in the upper ticking. Now, under each eyelet there is a loop dropped from both those straps running lengthwise and crosswise. This loop is

(Testimony of Harry J. Malerstein.)

formed for the intention to take up the straps on the inside, which it calls for in this here patent. This is exactly how it is before it is pulled down and after it is pulled down.

Q. Do you find any difference between the construction of this mattress, Exhibit 3, or any of the features of it, and what is shown in the Malerstein patent; and if so point them out.

A. Not one. It is all made in accordance with this here idea of the patent.

Q. You find no differences? A. None whatever.

Mr. BLAKESLEE.—We offer in evidence under the stipulation certified copy of the Malerstein patent [48] No. 1,421,270, as Defendants' Exhibit "R."

The COURT.—It may be filed.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Please take the Malerstein patent you have in hand and also look again at this mattress you have just examined. It is my recollection you stated there were no differences between the mattress shown in the patent and this defendants' mattress Exhibit 3. I call your attention to the string or tie marked "18" as shown in Fig. 5 of the patent and call your attention, further, to the fact that that string is not sewed through these loops. Now, will you look at the mattress and tell me if the construction or the connection of the string or tie with those loops is the same as shown in the patent?

(Testimony of Harry J. Malerstein.)

A. Can I rip up a little more here?

Q. Yes, you may rip it up further if you wish.

(Witness ripping mattress, Plaintiffs' Exhibit 3.)

A. Now, I find on this here mattress the ties is hooked to the strap. Instead of going around the loop it is hooked up at the strap.

Q. That is, through the—

A. Through the loop.

[49] Q. In other words, in Plaintiffs' Exhibit No. 3 the tie or string passes through the material forming the loop and not around it as shown in the patent; is that correct? A. Yes.

Mr. GRAHAM.—That is all.

#### Redirect Examination.

(By Mr. BLAKESLEE.)

Q. Have you any further statement to make as to what you find in this connection?

A. Yes; I can explain something more.

Q. Yes; state what you have to say.

A. In this regard, as far as the twine and the loop over here, this being a new thing in the market, it took us a little time to break in the mattress-makers how to tuft this mattress. Now, after a few weeks making this mattress we found out that at the top of the goods, and at the top of the mattress, where it shows a seam running one way or the other, there is a corner right there where the eyelet sets. If the mattress-maker takes his needle and goes down pointing toward the corner of these two seams, going down toward the bottom straight, and going in at

(Testimony of Harry J. Malerstein.)

the bottom pointing again to the corner and coming up to the top straight, it will go around those loops; you [50] can't go any other way but hook them up in the angle. This (referring to exhibit) may have been made from the very first, I would judge it was, so this was not made as it should be, but it took us some time to perfect it.

Q. Can you state what, if any, difference it makes in the action or effect of the twine or the tab whether you run the twine around the tab or run it through the tab?

A. It doesn't actually make any difference at all. It holds just the same. But my idea was, when I thought of that patent, that no goods were strong enough to hold any tufts. When you insert twine with a sharp needle in any goods—it may be ducking or any strong goods—it will break through while using it, and my idea was, when I formed those loops, to tie the twine around the angle of the goods running both ways, therefore if you hook up against the angle with any twine or any lace you are pulling against the strength of the goods running both ways, and it is as strong as could be made, to make the mattress last; so therefore I was insisting on making those ties around the loop at the time when I was making the mattress.

Q. What other feature of this mattress, Plaintiffs' Exhibit 3, or of your patent, have you to [51] mention as being beneficial?

A. There is one thing I have in regard to this mattress: it is the only mattress patented yet, as

(Testimony of Harry J. Malerstein.)

far as I know, in our line of business, that has the exact finish size. There are several patents and several mattresses made where there is a take-up in them somehow although they are patented constructions, but there is none that will go to the exact finished size.

Q. Well, is it possible to cut to the exact finished size in making the "Sanotuf" mattress of the plaintiffs?

A. I couldn't tell you exactly about the "Sanotuf," how it is, exactly, or whether it is made to any size; but I would judge that the mattress reinforced like the patent here, both ways, is the only one that could be cut exactly to any size.

Q. Now, that is this Exhibit 3 reinforced both ways? A. Yes, sir.

Q. You mean having those cross strips?

A. It has strips running lengthwise and strips running crosswise.

Q. Do you find any such thing in the "Sanotuf" mattress of the plaintiff?

A. No, sir. His strips are running one way, [52] across the width of the mattress.

Q. And that gives extra strength, does it, in having those cross strips? A. It helps.

Q. And how about preventing stretching?

[53] A. The preventing from stretching comes in there. Every mattress that is cut in the common construction, there is an allowance of from four to six inches in length and width, because after a mattress is pulled down there is an inch of goods



(Testimony of Harry J. Malerstein.)

going into each of those pockets which must be allowed for before the mattress is made; consequently, after using that mattress for several months or something like that—all depending on the quality,—the mattress will stretch the amount of the excess goods after it flattens out. Now, the only way to prevent that stretching is not to put in the goods, and the only way not to put in the goods is if you can find a way how to take up the excess goods in the inside of the tick.

Q. Is there any such taking up of excess goods provided for in the Roberti mattress?

A. All I could see, there is a tab in there that it pulls down from the inside of it.

Q. Will that prevent stretch in every direction?

A. No, it will only prevent stretching in width.

Q. And in yours you prevent stretching in both directions? A. In both directions, yes.

Q. Are there any other features of difference that occur to you at this time?

A. Yes. In reinforcing the strips there is also another idea. Every seven or eight inches, as you will see in that [54] mattress, it represents a mattress by itself. In other words, every square block that is formed in that mattress after it is made represents a little thing by itself, a little individual part. Every part carries its strength in that particular mattress, whether it is small or large size, because it forms an all-around structure of each section, in the center of the mattress and in

(Testimony of Harry J. Malerstein.)

the side of it and all over the mattress, which I haven't found in any other mattress.

Q. Do you find it in the Roberti patent in suit or in the Roberti mattress?

A. No, sir. There it is only enforced one way.

Q. And all of these units taken together work to produce a complete mattress that will not stretch; is that it? A. Yes.

Q. Are there any other differences or features that you find? A. I guess that is all.

Mr. BLAKESLEE.—That is all.

#### Recross-examination.

(By Mr. GRAHAM.)

Q. Mr. Malerstein, this ticking used to cover mattresses, does that stretch equally in both directions?

A. It all depends on the quality of the goods.

[55] Q. No matter what the quality is, if it was a poor quality, would it stretch the same in width as it would in length?

A. No, sir. There is certain goods used for mattress-making to a large extent called drills. Drills will stretch on the angle; they will not stretch on the width. Sateens will stretch in width and not in the length.

Q. Well, ticking such as is used on these mattresses, does that stretch more in one direction than the other?

A. Well, this sateen will stretch in width more than in length.

(Testimony of Harry J. Malerstein.)

Q. Then on ticking such as used on these mattresses it is not necessary to have strips running lengthwise, is it, if you say it will not stretch in thickness?

A. Well, but this reinforces the mattress. It will stretch in thickness less than it will in width. But the length, you understand, is longer than the width of the mattress, therefore it will stretch a little, and in the end it will stretch by the end as much as in width.

Q. It is in the width, then, that you need the reinforcement, is it not?

A. According to my idea it needs both.

Q. Now, referring to those little strips you have sewed on the inside of the mattress, they are considerably wider than the opening in the eyelets, are they not? A. This here strip on this mattress?

[56] Q. Yes.

A. Well, those strips are not exactly uniform.

Q. How wide are they?

A. They should be three-quarters of an inch wide.

Q. And there are two of them crossing right under an eyelet? A. Yes.

Q. And how large is the opening in the eyelet?

A. Oh, I don't know. About a quarter of an inch I guess it would be.

Mr. GRAHAM.—Well, that shows for itself.

Q. Now, when a filling is put in that tick those straps are pushed right up against the eyelet, are they not? A. Yes.

Q. And then in putting the needle through is it

(Testimony of Harry J. Malerstein.)

not more likely that it will sew right through those strips than otherwise, as shown by your mattress?

A. I didn't hear that.

Q. Is it not more likely that they will sew right through the strips than tend to go around them as you have described?

A. Well, as I have stated, this was sewed to the loops when it should have gone around.

Q. Now, when you go through the top of the mattress, that is, you go through the upper tick and then through the filling, how do you dodge the loops before you pass out [57] of the eyelet in the bottom tick?

A. If you go down straight you will miss it, going from the top. If you point towards the corner of the seams running both ways going down straight you work the tab on the side.

Q. Isn't that pretty much guesswork?

A. No; after working awhile on the bench the mattress maker will know right off whether he strikes that loop or not. If he goes down straight he runs the loop on the side.

Q. Now you have stated that when you go through the upper eyelet you go over at an angle, and it must be a considerable angle, because you are going through, according to your testimony, a quarter-inch hole and you are missing a three-quarter inch strip, therefore your needle would be at a considerable angle. Now after you miss the upper strip and are starting down through the filling how are you

(Testimony of Harry J. Malerstein.)

going to guide the needle to pass through the lower—

A. The strip is three-quarters of an inch; the eyelet is a quarter of an inch wide, and you only have a quarter of an inch to work on the side. It is very simple; it is done.

Q. But you haven't told us how you do it.

A. Well, as I say, if you go down the top you point toward the angle with the needle, that way. If I had a [58] needle I could show you.

Q. Here is a mattress needle (handing same to witness). Now show the Court how you perform that operation.

A. (Demonstrating on Exhibit 3.) Well, this is the hook here. (Demonstrating.)

Q. Now that is much easier because the loops in that are pulled down. I want you to show how the needle goes through.

A. Well, if you have the loops come up you pull it down and kind of go against it. When the loops lay loose under the eyelet you go like this (demonstrating).

Q. Doesn't the filling push the loops up against the tick? A. Yes, but they just lay there.

Q. And you have a sharp-pointed needle?

A. Yes, something like this, but not quite as large.

Q. You can't see the loops at the bottom eyelet; you don't turn the mattress over and look at it, do you?

A. No, but the rack for the mattress is formed out of slats, with six or seven inch spaces between

(Testimony of Harry J. Malerstein.)

the slats. Now they lay out the mattress straight along one slat, with an opening down at the bottom. Now they will see the goods coming right through, and don't have to go on the side of it.

Q. Do they always hit the eyelet?

A. No; they look at it, they feel it. You have to look in the bottom to catch the straps.

[59] Q. But can you see the lower straps when you are working on the eyelets?

A. If they lay flat you don't see it. He will feel the strap through the eyelet, and that will show him the goods, and therefore he knows he has to take it out and go on the other side of it.

Q. As a matter of fact you can't say positively that in making mattresses under the Malerstein patent they do not sew through the straps, can you?

A. Yes.

Q. Is this mattress here one of your mattresses?

A. Yes, that is made by J. H. Jonas & Sons.

Q. You have testified that this mattress was made in accordance with your patent. Is that correct?

A. Just now I said this mattress was made by J. H. Jonas & Sons.

Q. But you have testified this mattress was made in accordance with the Malerstein patent.

A. Yes.

Q. And this shows the ties going through the strips, does it not? A. Yes.

Q. And in your patent the strips are not sewed through by the ties but the ties pass around them; is that correct? A. Yes.

(Testimony of Harry J. Malerstein.)

Mr. GRAHAM.—That is all.

[60] Redirect Examination.

(By Mr. BLAKESLEE.)

Q. You mean us to understand that the cord always went through the tabs, or part of the time, or what have you to say about that? Did they go through the tabs some of the time, or how much of the time?

A. Well, at the beginning, while the mattress makers were not very good at it, it being a new thing to them, some of them would insert it in the tab; but after they had been working toward that end, in order to perfect it,—I just notice, this being one of the first mattresses, you will notice the loop is sewed around over here, while over here it is square.

Q. Well, after your mattress makers got accustomed to making them what was the method?

A. It was going around the loops.

Q. Did you follow the manufacture right along at the defendants' place?

A. Yes, sir; I worked there.

Q. Were you in charge of the manufacture?

A. Yes, sir.

Q. And was that the practice, to put the cord around the tab?

A. Yes, sir. They have been getting fifteen cents extra for tufting by that particular method.

Q. The workmen? [61] A. Yes.

Q. Now do you know from your observation whether the tufting ever breaks in the plaintiffs' mattress? A. The tabs?

(Testimony of Harry J. Malerstein.)

Q. The tabs or any part of the tufting.

A. Yes, sir.

Q. Where does that break occur?

A. The tab breaks loose from the strip.

Q. Have you seen that in mattresses made by the plaintiff?     A. I have seen it—

Mr. GRAHAM.—That is objected to as secondary evidence. If anything of that kind occurs he should produce the mattress in court.

The COURT.—He may state if he observed it.

A. Yes, we have noticed several of them in the stores, that have had tabs broken loose off them; that being in the filled mattress.

Q. Have you ever had that occur in making a mattress in accordance with the Malerstein patent, where the cord passed around the tabs?

A. No, sir. Dealers seem to praise the idea of it, that you can put up a dozen or fifteen mattresses one on top of the other, and after you pull out the bottom mattress it will assume the same shape as the top one would.

[62] Mr. GRAHAM.—We move to strike that out as not responsive.

The COURT.—It will be stricken out.

Q. (By Mr. BLAKESLEE.) Have you ever had the tabs break where the cord or twine went around the tabs?     A. No, sir.

Q. Did you ever have any occurrence of breakage of that sort?

A. Not that has come to my attention.

Mr. BLAKESLEE.—That is all.



(Testimony of Harry J. Malerstein.)

Recross-examination.

(By Mr. GRAHAM.)

Q. You referred to the workmen getting fifteen cents extra. What did you refer to?

A. For tufting. Just tying this particular mattress.

Q. You don't want us to understand they got fifteen cents extra for missing these strips and not going through them, do you?

A. For tying their tie to go around the loops; yes, sir; because otherwise, for missing the loops, they were not supposed to get anything. They were supposed to take less for that mattress, for the simple reason that in a common construction mattress they have to mark out the spaces where they have to tuft, while here they had eyelets to guide them and they could catch those loops [63] without any interference. But in order to work around those loops and tie them both together they are getting fifteen cents extra to-day. I understand. That was my arrangement with them when I first put them on the bench.

Q. A mattress-maker could take a needle and sew right down through the eyelets of defendants' mattress, could he not? A. Sure.

Q. He wouldn't have to change the position or construction of any parts?

A. It would never be satisfactory.

Mr. GRAHAM.—I didn't ask that, and I move to strike out the answer.

The COURT.—It will be stricken out.

(Testimony of Harry J. Malerstein.)

A. He could do it.

Q. (By Mr. GRAHAM.) And he could do it without any change in the construction; that is, you would have the same eyelets, the strips in the same place, and the filling in the same place, and the mattress maker could simply take the needle and go straight down through the straps and eyelets?

A. He wouldn't catch both strips at all times.

Q. Well, he could sew through the strips, could he not? That is the question.

A. Sometimes yes, and sometimes no.

Mr. GRAHAM.—That is all.

[64] Mr. BLAKESLEE.—That is all.

The COURT.—All witnesses who have been subpoenaed to be here will please return at two o'clock.

(A recess was thereupon taken until two o'clock P. M.)

[65] AFTERNOON SESSION—2 o'clock.

### TESTIMONY OF JACOB H. JONAS, FOR DEFENDANTS.

JACOB H. JONAS, defendant herein, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name.

A. Jacob H. Jonas.

Q. You are one of the defendants in the present case, are you? A. Yes, sir.

(Testimony of Jacob H. Jonas.)

Q. How long have you been in the business of making mattresses and selling them?

A. Since 1907.

Q. All that time in Los Angeles?

A. No; also in San Francisco. In Los Angeles since 1917.

Q. You have been here since 1917?

A. Yes, sir.

Q. The defendant Malerstein is your son-in-law, is he not? A. Yes.

[66] Q. And when did he enter the business with you? A. In 1917.

Q. Did you have it called to your attention when patent was issued to Mr. Malerstein, No. 1,421,274, copy of which is Exhibit "R" in this case? Was it called to your attention when that patent was issued?

A. When that patent was issued; yes, sir.

Q. Did Mr. Malerstein call it to your attention?

A. Mr. Malerstein, when he had a patent, showed it to me and showed me he had a patent for this.

Q. Did you have any discussion at that time regarding this patent and its invention?

A. I had a discussion. I examined it, and I said, "I believe that is the very best mattress I have ever seen in that line made."

Q. Did you commence making mattresses like this patented mattress at that time?

A. Not right off when the patent was issued. It was quite a little while later. I don't know—it must have been several months.

(Testimony of Jacob H. Jonas.)

Q. And was anything said or done regarding your having permission to make such a mattress?

Mr. GRAHAM.—We object to any contractual relations between the party J. H. Jonas and the party Malerstein as entirely immaterial to this case. The fact appears in the case that they are making mattresses, or claim to [67] make mattresses, like the Malerstein patent. Now as regards any contractual relations, or on what terms they were made, it does not affect the issues in this case at all.

Mr. BLAKESLEE.—We simply want to show there was an implied license at least under the theory that they were operating in accordance with the patent to one of the defendants, which, while it may not raise a presumption of noninfringement, still raises a presumption of patentable difference, as counsel has stated, and also raises certain presumptions as to good faith, and it is material for those reasons in an equity case of this sort.

The COURT.—It occurs to me that on the latter ground it might be admissible. The objection is overruled.

Mr. GRAHAM.—Exception.

Mr. BLAKESLEE.—There are decisions point-blank to the effect that where the defendant is operating under another patent it is a presumption of noninfringement; but this Court has never heard me assert that doctrine here, nor will I ever do so, because I agree with Mr. Graham that that

(Testimony of Jacob H. Jonas.)

is not good law. But the fact of a patentable distinction is good law.

(Last question read.)

A. Merely the fact that he had a patent. I considered that, that that was sufficient proof that a mattress [68] like that could be made under the granting of a patent.

Q. Was anything said between you and Mr. Malerstein about your starting in to make such a mattress and his owning a patent on it?

A. Do you mean under what rights?

Q. Yes, anything about such rights.

A. Well, the right to make that patent was considered, and he said, "We will make that mattress here in Southern California and all the royalty that I can get out of it will be out of the company"—what he gets in other places. In Southern California we were supposed to make that mattress.

Q. You and he and your sons? A. Yes.

Q. And you were partners then, including Mr. Malerstein?

A. Well, we were partners anyway.

Q. But he was not a partner in the business?

A. No.

Q. But he permitted you to go on and make these mattresses, did he? A. Yes.

Q. Has he at any time terminated that permission? A. No, he has not. Not as yet.

Q. At no time? A. No.

[69] Q. And at all times he has known of your making those mattresses, has he? A. Yes.

(Testimony of Jacob H. Jonas.)

Q. What have you to say, Mr. Jonas, as to the defendant's mattress like Exhibit 3 in comparison with the mattress put out by plaintiffs and known as the "Sanotuf," from the standpoint of its commercial features and the features of it upon which you sell it?

A. Well, I consider that mattress, from a commercial feature, the best made in this line, much superior to plaintiffs.

MR. GRAHAM.—I move to strike out the answer as a conclusion.

THE COURT.—He may define what he means by giving his reasons.

A. (Continuing.) In the first point of view, what we call a never-stretch mattress, many people were trying very hard to get ideas to construct a mattress which would not spread and stretch, including the defendant, who has a mattress that he considers has a never-stretch feature in it. But from my experience I have noticed and I have seen mattresses, the defendants', which, after a while using, they were battened out and they were just as wide as if they had never been constructed with the never-stretch feature, for the simple reason that when they cut their mattress they allow for the ticking just [70] as much if it would be tufted, and the mattress spreads out after a little while using; where with that mattress that we were manufacturing under the Malerstein patent, that mattress, from a practical point, we know that we cut that mattress the exact size before it is made,

(Testimony of Jacob H. Jonas.)

and to correspond to the size when it should be made after it is tufted or pulled down on the side. There is no allowance made whatsoever in any way or shape in the ticking to allow any spreading. The main feature about our mattress, what we manufacture under the Malerstein patent, we consider that superior, is the way the ties inside are made. They are doubled across each other and a string goes around and takes in the bottom and the top ticking, and when it is pulled down it holds firm and can never relax. Now, again, as to plaintiff's mattress, he was making that mattress, to my knowledge, in different ways, experimenting with it, and I didn't see it as yet until it was an accomplished thing. The last one that he makes, with the tabs sewn on to the strips merely by going over once with a sewing machine, it is liable to break off the tab. Now if the tab doesn't break off, by pulling the needle and inserting the needle inside in the mattress and cutting through that pad, you don't know how far you cut that pad, whether it is right near or far away from the edge, consequently by a little handling of the mattress afterwards in the store or at [71] home that cut,—or the twine that cuts through that tab will cut the tab through and break it through. I know for a fact that the plaintiff had to send out in many cases and fix mattresses in various places for various dealers, and they all of them told me so before I ever knew about the Malerstein patent. I neevr considered them a perfect mattress, outside of a little advertising mat-

(Testimony of Jacob H. Jonas.)

ter; but to give the real value to the public it is far from being so. Our mattress, as I have stated before, is made where it eliminates all the defects the plaintiff's mattress has in it from a practical standpoint. Furthermore, when we started to sell that mattress I was insisting on the men to see to live up to it that that mattress should be made exactly as it is described in the patent, because that is the only feature where that mattress is good, and we had hardship in the start with the men not being experienced, and some of them, unfortunately, worked in plaintiffs' place, and they were used to sticking that needle through that tab and they forgot themselves and they were sticking the needle through the strips; consequently, while it was not so easy to break through as in the plaintiffs' mattress, still it wouldn't break out.

[72] Then Mr. Malerstein was foreman or superintendent in that department, and he said to me, "The men cannot make it for that price because they claim it takes them longer to get around and get the ties around the mattress"; and I said, "If that is the question we will have to stand the price—raise the price for that mattress and pay more," which we did. We paid them 15 cents, and it is understood that they have to do that work precisely as described. Now, again, when we were going out to sell that mattress, whenever I came in contact with prospective buyers, the first thing was to convey the idea that that mattress outwardly might look like some similar mattress in the market, but



(Testimony of Jacob H. Jonas.)

it is no comparison, one with the other, and that mattress is so superior. And I showed them the construction and went into details to explain to them; and I said, "Did you ever handle the other mattresses on the market?" Most of them said yes. "How did you find them?" They used to say, "Well, —"

Mr. GRAHAM.—I object to any testimony as to what was said, as hearsay.

The COURT.—Yes, that is hearsay.

Mr. GRAHAM.—And I move to strike out—

The COURT.—You may state what you observed, yourself, but do not state what other people told you. [73] You will have to produce them to testify for themselves.

A. (Continuing.) I observed it myself, that that other mattress will consequently not stand criticism while being used or handled; that, more or less, they are apt to break through the tabs; and, explaining that situation, I showed them the difference in the superiority of that construction of the defendants over any similar mattress in that line, and everyone admitted—

Mr. GRAHAM.—Now, if the Court please, we object to any statement made by anyone else, as hearsay.

The COURT.—Yes, that, again, would be hearsay. Do not say what was said by anyone, unless you were talking to one of the parties to this suit.

Q. (By Mr. BLAKESLEE.) You have seen

(Testimony of Jacob H. Jonas.)

mattresses, have you, put out by the plaintiffs where the tabs were torn? A. Yes, sir.

Mr. GRAHAM.—That is objected to as leading.

The COURT.—Well, that is more or less preliminary. The objection is overruled.

Q. (By Mr. BLAKESLEE.) On how many occasions? A. Many occasions.

Q. Where? A. In different stores.

[74] Q. Did you ever observe whether the mattresses put out by defendants (?) stretched in the tick? A. Yes, sir.

Q. And what did you observe?

A. I observed that the mattresses were sent over to us for remaking, for they were stretched and spread, and I measured those mattresses and they were three or four inches wider as they had them. We have some of them on exhibit at our place yet.

Q. I don't mean the defendants' mattresses; I mean the plaintiffs' mattresses. Do you know of cases where they stretch?

A. I know of occasions where they sent them over to us to be made over, for some people get mattresses back from customers when they are stretched.

Q. You don't mean the defendants' mattress, but the plaintiffs' mattress?

A. The plaintiffs' mattress, yes.

Q. Did you ever have any complaint from the trade of your mattresses ever stretching?

A. I never had any.

Q. At any time have you or have any of your

(Testimony of Jacob H. Jonas.)

salesmen or representatives represented to the trade that the mattresses put out by you were the mattresses of the plaintiffs in this case?

Mr. GRAHAM.—That is calling for hearsay [75] testimony, and we object to it, your Honor.

The COURT.—As far as he knows he can answer.

A. We never did allow anybody to represent our mattress for the defendants' mattress.

Q. (By Mr. BLAKESLEE.) Did it ever occur to your knowledge?

A. It never occurred to my knowledge at all.

Q. To your knowledge did you or did any of your representatives ever represent to the trade or to anyone that the mattresses put out by you were the same as the "Sanotuf" mattress?

A. It would be—

The COURT.—No, just say yes or no.

A. Never did.

Q. (By Mr. BLAKESLEE.) Have you or has the defendant or have the defendants ever put out to the trade or made or sold or issued from your factory any mattress bearing the name or trade-mark "Restmore"?

A. Never did under the firm of J. H. Jonas & Sons.

[76] Q. Under what name have you issued your mattress? What name have you applied to it? A. I applied the name "Tiednotuff."

Q. And how long have you used that name on the mattresses?

A. I used it previously in San Francisco. I

(Testimony of Jacob H. Jonas.)

made a mattress of different construction, but I abandoned it and for a long time didn't make it, and I newly started to use it when Malerstein's patent was granted.

Q. Have you applied for registration of that trademark in the Patent Office? A. Yes, sir.

Q. I show you a model of part of a device resembling a mattress or a framed construction covered with ticking and ask you if you know anything about it? A. Yes, sir.

Q. Please tell us what.

A. Well, that was made to show to prospective buyers the construction of the mattress and what it consists of. That gives them an intelligent idea how and what that mattress inside looks and what makes that mattress—what we claim it to be.

Q. What mattress do you refer to now?

A. To the "Tiednotuff."

[77] Q. To the defendants' mattress?

A. The defendants' mattress, what we are making under the Malerstein patent; and we were trying to convey the idea to prospective buyers, and we furnished them with those sometimes to show their prospective buyers what the mattress is; because most people, when they buy a mattress, think the mattress is only what it looks like; and that is to show the goodness of the mattress, that it has holes, and is ventilated and so forth.

Q. Is this one of a number which you made to give to your trade?

A. Yes; we made about 100 or more I think.

(Testimony of Jacob H. Jonas.)

Q. When did you make that one?

A. We made that one right when we started to manufacture the mattress.

Q. As far as this goes, does it follow the construction set forth in the Malerstein patent?

A. Precisely, to our knowledge.

Q. What have you to say as to the connection of the cord or thread with the tabs in the mattresses you put out? Please state how they have compared with the way the cord or thread is applied to the tabs in this model.

A. In this model we show that the tuft, or string that is supposed to take the place of the tuft [78] in the mattress, goes around on those straps that they are sewing across each other, and the width and the length. In the first place the crosses of those strips reinforce that ticking to that extent that the ticking by itself will not stretch. There is a difference between spreading a mattress and stretching a mattress. A mattress spreads on account of the allowance of tufts in the common mattress where they are pulled down for every pocket created by the tuft, and after using them a while the mattress spreads out. There is also a stretch in the ticking, which is that the ticking itself, the construction of it, will stretch by a little using. Now, those crosses running the width and length of the mattress reinforce the mattress. That ticking by itself is stronger, not to stretch, and also by being flat in the top—that is exactly the size of the mattress cut—an allowance is made inside, in the

(Testimony of Jacob H. Jonas.)

loops, and doesn't allow for spreading, because there isn't any extra material given in that ticking to allow the spreading as in common mattresses. Now, again the strings, or that cord, tying the top to the bottom, as you might observe, has two strips sewn on, fastened on to the tick, and they actually will stand any pressure put upon them, more than it is necessary to hold, being that every section is like a mattress by itself; it [79] holds the filling inside firmly and doesn't let it shift from one place to another, and also makes it even fitting throughout; where in the plaintiffs' mattress the allowance is not made for the tufts. The ticking is actually pulled down flat as it would be in a common constructed mattress. It is not as it represents. The mattress, a little while using, spreads out, and it is wider than it was when it was made on the start; then it doesn't have the effect that it should have or what is claimed for it. Now, he reinforces the mattress, truly, in the width, with that tab, or the strip sewn to the tab, but it doesn't do good for certain kinds of ticks which stretch lengthwise just the same, or crosswise, and therefore it doesn't answer the purpose as good as our mattress that we are making under the Malerstein patent.

Q. Now, how does that model compare with the way you have made your mattress in the way that the cord or twine is connected with tabs?

A. Connected with the strips?

Q. Or with the strips there. Is that the way you made the mattress?

(Testimony of Jacob H. Jonas.)

A. That is just exactly the way we are making the mattress, yes.

Q. Have you at times passed the cord or twine through the tabs?

[80] A. On the start, when we started to manufacture that mattress, due to some people having worked on a similar mattress—or I believe it was the defendants' mattress—being used to put that needle through their tabs, they thought we wanted them to do likewise, and they made, in the start, some mattresses not paying attention to the real construction as we should want him to make, and when we noticed that, when we knew that that would not stand up, or it might also break, too, sometimes, then we instructed the men—and we also paid them more for it—to make that mattress exactly like that sample you have in your hands.

Q. Now, in sewing those tabs or passing the cords through the mattress to connect these tabs you use a very long needle, do you? A. Yes, sir.

Q. And using a long needle like that, is it easy or difficult for the workman to pass the needle through at one side of the tab rather than passing it through the tab?

A. That eyelet, standing where it is, is about in the middle of the tabs, and the mattress maker has to insert the needle and he can feel when he gets through that cloth and he has to work away—if that strap would be in his way he works it away with the needle, or with the regulator as they call it, just to go [81] around it, and when he gets to the

(Testimony of Jacob H. Jonas.)

bottom he just works his way through in the same way, to eliminate that strap and go around by it to make the tie.

Mr. BLAKESLEE.—We offer in evidence this specimen of mattress model sent out to the trade as testified to by the witness, as Defendants' Exhibit "S."

Mr. GRAHAM.—If that is offered for the purpose of showing the construction of defendants' mattress, we object to it as not the best evidence. It is merely a model that has apparently been made specially for a definite purpose.

The COURT.—For the purpose of illustration; and comparison with the patent will show whether it is accurate or not.

Mr. BLAKESLEE.—Yes, and also being a specimen of models sent to the trade on which they actually do business, on this whole question of infringement and unfair competition; bearing also, as part of the exhibit, the label "Tiednotuff."

The COURT.—It will be received.

Mr. BLAKESLEE.—Counsel may inquire.

Cross-examination.

(By Mr. GRAHAM.)

Q. Did you have any agreement with Mr. Malerstein about the manufacture of this mattress?

A. We had a verbal agreement.

[82] Q. Did you have an agreement with him that he was to be taken into the firm or to share in the profits?

A. No, we didn't have any agreement of that



(Testimony of Jacob H. Jonas.)

kind. The only agreement was when they started to sue, or the plaintiff, when first I was notified that he was in litigation, I was supposed to furnish the cost and expense to carry that through court to show the legality of making that mattress, and for that purpose we will be allowed to make that mattress in Southern California without expense.

Q. You have spoken of seeing some experimental mattresses, so-called by you, made by the plaintiffs?

A. Yes, sir.

Q. When did you see those?

A. I saw them in 1916, and then I saw them again in some later years. The reason why I remember 1916, that was the year before I left San Francisco. And then again when we were here in business in Los Angeles in 1917 and started in I have seen several different specimens of mattresses entirely different made as any one of the exhibits or the claims in that patent.

Q. Well, they make a great number of mattresses, do they not, to your knowledge?

A. I am speaking about that "Sanotuf" mattress. [83] The "Sanotuf" mattress was made in a different manner as exhibited here.

Q. Did you see any of these mattresses that you have just referred to in San Francisco?

A. I have seen them in San Francisco; I have seen a model of it only, shown by a representative, a fellow by the name of New.

Q. When did you leave San Francisco?

(Testimony of Jacob H. Jonas.)

A. In the latter part of 1916; about December I think.

Q. How long before you left there did you see this model?

A. I don't remember, but I have seen it prior to that.

Q. How long prior to that did you see it?

A. I don't remember if I have seen it prior to that.

Q. Did you see it a year or two years or three years prior?     A. Prior to 1916?

Q. Yes.     A. I did not.

Q. When did you see it?

A. I saw it just about when I sold my business in the Consolidated Mattress Company, and there was a traveling salesman for the firm of New & Frank I think [84] it was—but I knew that man New, who was from Chicago, and he had a sample of a mattress and said it was made by Roberti Brothers, and he showed it to us and he said—I think his intention was to get us interested to make that mattress on a royalty. I told him that I didn't think much about that mattress, that it doesn't seem to stand up to any criticism, or that it had any merits worth while.

Q. Well, at any time that you saw that mattress some time in 1916, you knew that before that, did you?

A. I never heard about it before, no.

Q. Then what do you mean by saying it didn't stand up under criticism at that time?

(Testimony of Jacob H. Jonas.)

A. From the sample that he showed us I said "A mattress like this will not stand up, and it is not worth while to make it."

Q. Then it was just your opinion?

A. That was my opinion.

Q. It was not formed by the expression of anyone else, but yourself?

A. I myself and my ex-partner—at that time we were partners—of course we are partners here now too.

Q. Describe how that sample was made?

A. That first sample what I have seen had no eyelet. It was a pad sewn back of the ticking, no [85] strip whatever, and merely pulled through the top of the mattress and through the ticking, and after you insert that needle through that ticking, consequently that little hole that needle would make they said we could strike out or rub it up with the point of a needle and it will never be shown. He also stated at that time that they are trying to make eyelets but they didn't have the machine or the manner or the way how to make it; but they said they were expecting pretty soon to put in eyelets, and that it would be much better. That was the first one I saw.

Q. Now, with respect to the old, common form of mattress, did they have any trouble with the ties?

A. With the ties in the old mattresses there is no trouble, so to say. The majority or the greatest majority of them will always stand up as far as the ties are concerned. The tufts fall out. That

(Testimony of Jacob H. Jonas.)

seems to be the trouble with the old construction mattress.

Q. Did the ties ever become untied or break?

A. Very seldom. The ties don't break, more or less, in a mattress. Very seldom they will.

Q. Now, you have testified regarding the carrying away of the tab in plaintiffs' mattress. Do you mean that the tab became torn at the part where it is sewed fast to the strip? A. Yes, sir.

[86] Q. Now, with that construction of mattress, the stitches run across the direction of pull, don't they? A. I can't understand that.

Q. I say, the row of stitching that fastens the tab to the strip runs across the pull on the tab, does it not?

A. The tab is sewn on to that strip, yes.

Q. And the row of stitching runs across, and the pull it against the whole row of stitching, is it not?

A. Well, the tab is only about, to my knowledge, whatever I have seen of them, about an inch or an inch and a half wide, and there isn't enough stitches or sewing in that little tab to stand the pull.

Q. Now, in your mattress the pull of the tie is against the end of a single row of stitching, is it not?

A. Against the end of a single row of stitches?

Q. Yes. A. What do you mean by that?

Q. Look at this mattress, one of your own mattresses here, Exhibit 3. (Counsel and witness examining mattress.) The row of stitches runs toward the eyelet. A. Yes.

(Testimony of Jacob H. Jonas.)

Q. And the pull on the strip is against the end of a single row of stitches on that, is it not?

[87] A. Yes, but the difference is that that strip or tab is sewn on the whole face of it. You would have to pull that whole ticking—there are many thousands of stitches on the length of it to hold it.

Q. Yes, but you are pulling against one single stitch at a time, are you not?

A. The proof of it—you can try—

Q. I am asking you to say whether or not the pull is against a single stitch at a time.

A. Is sewn on the whole face of it, one single stitch, yes.

Q. Now, will you look at the plaintiffs' mattress? (Counsel and witness examining Plaintiffs' Exhibit 4.) I call your attention to the way the tab is fastened to the strip. Now, the pull on that is against a row of stitches extending all the way across the tab, is it not?

A. Yes, sir, across the tab.

Q. And with that knowledge would you say that the tab will pull off as easily as the strips will become loosened and sag down on defendants' mattress?

A. It stands to reason, from a practical standpoint, that that tab is only a narrow little piece of material sewn on, where there is only a limited amount of stitching holding it, and that will surely more easily break off than strips sewn on the whole face of [88] the mattress, where you would have

(Testimony of Jacob H. Jonas.)

to tear the whole mattress off, with so many of those stitches, before you can loosen it.

Q. I am not asking about pulling the whole mattress off, but if those stitches will not become loosened and permit the part of the strip to which the tie is fastened to sag down.

A. From a mechanical point I would say that they will not loosen as easy as the other.

Q. And you will say that in view of that there is a pull against a single stitch in defendants' mattress as against a pull against the whole line of stitches in plaintiffs' mattress?

Mr. BLAKESLEE.—That is argumentative and speculative. The question is whether they do give way.

The COURT.—Of course he is asking which will give way more readily, one or the other. What do you think about that?

A. The fact that defendants' mattress, that strip, by itself, sewn by one single seam, never gives way, but the tab, goes to show that one single seam holds better than that tab. If our mattress is sewn on the strip or the face—I have never noticed one of the defendants' mattresses where the strip sewn with a single seam will give way, but the tab does give.

[89] Q. (By Mr. GRAHAM.) Now, in regard to the stretching of the mattress, you have testified that defendants' mattress will not stretch. Is that correct? A. Yes.

Q. I call your attention to defendants' mattress,

(Testimony of Jacob H. Jonas.)

which is Plaintiffs' Exhibit No. 3, and ask you if this material from which the strips are made is not the same material as the ticking. A. Yes, sir.

Q. I also call your attention to the fact that that strip is secured to the ticking by a single row of stitching. Is that correct? A. Correct.

Q. And that the strip is entirely loose except where it is connected by that row of stitching.

[90] A. That is loose for that purpose, to create that loop on double crossing.

Q. I am referring to this long strip between the loops.

A. Yes. The long strip between the loops is sewn down tight to the ticking, yes.

Q. Now, as a matter of fact, isn't that loose (showing)?

A. Do you mean the—well, the seam couldn't hold the whole strip; the seam goes on in the middle. But you couldn't tear it off.

Q. The seam is loose on both exhibits, is it not?

A. Yes.

Q. And that material, being the same material, will stretch the same as the ticking, will it not?

A. But that strip is double and sewn before. We sewed those strips before, on the machine, and we are supposed to turn them over twice or three times, and sometimes more than that, and sew it on the machine. We make those strips before. Then after that we take that strip and sew it to the ticking. Now when that same strip is folded over twice or three times and sewn one seam through, that creates it

(Testimony of Jacob H. Jonas.)

one strong piece of material that you can hardly tear. You can take off a piece and try to tear it and you will find how strong it is.

Q. The strip is not sewed fast all the way across from one side of the tick to the other, is it?

[91] A. Yes, sir, from one end to the other.

Q. I call your attention here to where these loops are formed.

A. Outside of the loops, where it is purposely to create that loop. It couldn't be otherwise.

Q. And at those parts where it is not sewed fast, in other words, where the loops are formed, there might be some stretch there, might there not?

A. On that little part, that half inch, where the ticking is loose, that ticking will stretch, but that will be insignificant from a practical point. That surface where that part is now sewn on to it doesn't come out to one ten-thousandth of the surface of the mattress.

Q. You have just said it compared as one ten-thousandth of the mattress, How long across it that mattress?

A. That mattress, across, is fifty-four inches.

Q. And how much space do you leave unsewed for each tie? A. About half an inch.

Q. And how many ties are there across the mattress? A. Six, on a full size mattress.

Q. Then you have three inches in fifty-four inches that can stretch; isn't that correct; instead of one ten-thousandth?



(Testimony of Jacob H. Jonas.)

A. I meant to say on the surface of the ticking, which I did say. The stretchable surface of the ticking. You don't refer that to the whole width. Taking it per inch, and how many square inches you have in the ticking, and I [92] might not be far off.

Q. This tying operation of tying the defendants' mattress is quite difficult, is it not?

A. Yes, sir.

Q. And adds expense to the making of the mattress? A. Yes, sir.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BLAKESLEE.)

Q. In defendants' mattress where these loops occur the stitching goes right on across the ticking, does it not? A. Yes.

Q. And does that tend to prevent a stretch there?

A. Well, it doesn't do any material good, that sewing.

Q. Then you have other stitching that goes cross-wise of the tabs too, have you not? A. Yes, sir.

Q. And then the pulling of your goods on the tabs is resisted—

A. On the strips, you mean?

Q. Yes, on the strips, is resisted by the stitching going two ways, is it not? A. Yes.

Q. How firmly does that anchor the strips; does that anchor them firmly against breaking loose?

[93] A. By sewing up to the surface of the tick-

(Testimony of Jacob H. Jonas.)

ing, crosswise and longwise, they are, to my knowledge, indestructible.

Q. Do they ever break loose there?

A. I never have seen any one. We tested it before we put it on the market, and pulled it, put on more weight in pulling, where necessary, than any pulling of any description through any periods or length of duration of the mattress, and it never let go. You can readily tear the ticking apart before you would pull that strip off.

Mr. BLAKESLEE.—That is all.

Mr. GRAHAM.—That is all.

#### TESTIMONY OF JOSEPH F. AVRILL, FOR DEFENDANTS.

[94] JOSEPH F. AVRILL, called as a witness on behalf of the defendants having been first duly sworn, testified as follows:

##### Direct Examination.

(By Mr. BROWN.)

Q. Please state your name?

A. Joseph F. Avrill.

Q. What is your occupation?

A. Mattress-maker.

Q. Were you ever associated with the Imperial Cotton Works?     A. Yes.

Q. Where?

A. I first went with them in about 1911.

Q. Where?     A. In Los Angeles.

Q. Whereabouts in Los Angeles?

(Testimony of Joseph F. Avrill.)

A. About 1316 San Julian. About that number.

Q. What did you do there?

A. I was superintendent of mattresses and comforts.

Q. Do you know Edward W. Fox?

A. I do.

Q. Did he have any connection with the Imperial Cotton Works?

A. He was the general manager and secretary of the company.

[95] Q. Is he present in the room? A. Yes.

Q. How long did you remain on location at San Julian Street with the Imperial Cotton Works?

A. We were there until about the latter part of 1912. I guess it was along about October. We moved to a new building that was built for us at Sixteenth and Tennessee—now Sixteenth and Hooper.

Q. I show you here a paper and ask if that is your signature? A. Yes.

Mr. BROWN.—Note that the witness is referring to certified copy of the patent, being Exhibit "B."

Q. I also show you a second paper, Defendant's Exhibit "C," and ask you if that is your signature?

A. Yes.

Q. Do you know to what said exhibits just referred to, and which you have identified as your signatures, refer?

A. Why, to a tuftless mattress similar to these that have been under discussion.

Q. Did you ever manufacture any mattress in

(Testimony of Joseph F. Avrill.)

accordance with either of these applications for patent?

A. The first one that I made was about 1914—in the latter part of 1914—I should say about October.

Q. I show you the application. Is that the application [96] that you refer to, being Exhibit “B”?

A. Well, this is an improvement on the one I had at that time.

Q. I show you Defendants’ Exhibit “C” and ask you if that is the structure you manufactured?

A. Mine had the eyelets and a long strip running lengthwise of the mattress with hook-shaped—that is, there was enough slack left in the strip, doubled under, in order to make a loop to engage as you pass through the eyelet.

Q. Well, under which application for patent did you manufacture a mattress?

A. This is the one we manufactured in San Diego.  
Mr. BROWN.—Referring to Exhibit “B.”

A. (Continuing.) That had a tab fastened on one side. It was a continuous loop sewed at one edge to the upper cover, with the eyelet passing through the upper cover and the tab, leaving a loop about three-quarters of an inch underneath the eyelet.

Q. Now please describe just how you manufactured your mattress that was made at the Imperial Cotton Works.

A. Well, this was made with long strips fastened to the ticking with eyelets. The strips would start

(Testimony of Joseph F. Avrill.)

from the end of the mattress and run approximately about eight inches. There were eyelets passed through the strip—it was doubled back in the direction that it started from. The eyelet passes through two thicknesses of this strip, and there was [97] a slacking of about half or three quarters of an inch left there, and then it continued on to the next tuft, or about seven or eight inches, and the same operation again, attached to the top of the tick and doubled under and connected with two thicknesses of strips to the top loop and around again, and so on for I think ten tufts in the length and seven in the width—that is, seven strips running parallel to each other the full length of the mattress. These were connected with a needle passing through the eyelet and down through this loop and on through to the next loop, out, and back through the eyelet and up through this loop, through this filling and out to the starting point. They were tied, and the knot slipped down through the eyelet, making it hiding the knot and showing no tuft, only showing a slight depression in the mattress, holding the stock firmly between them.

Q. Now, when were such mattresses manufactured, in what year?

A. We made one in 1914, about October.

Q. How do you fix that time?

A. Well, it was during the strenuous times and everybody was looking for business. There was a never-stretch mattress on the market at that time by another firm here, and we were all out for the

(Testimony of Joseph F. Avrill.)

business that we could get, and Mr. Fox suggested that we also go into the field and try to get something, and I conceived this as a very good [98] mattress, non-stretch, to compete with this other mattress that was on the market at the time.

Q. How many of such mattresses did you manufacture?     A. I only made the one.

Q. And what did you do with it?

A. We had that in the display rack in the showroom at the factory at Sixteenth and Tennessee.

Q. To what extent was it seen?

A. It was viewed by a good many; in fact, everybody that came in there—Mr. Fox was highly elated with the idea and was very proud of it, and he showed it to everybody, a good deal against my wishes, because it was not protected. I asked him several times to protect it, and I don't know why he failed to do it, but he didn't. He also showed it to one of our competitors, and Mr. Ed Roberti used to come over quite frequently and I have seen him myself examine the mattress very closely as I would pass in and out of the office, and I have heard Mr. Fox explaining the good features of the mattress; that is, just as they were passing in and out he would tell them the good points.

Q. You heard Mr. Fox explain this mattress that was on the show-rack at the Imperial Cotton Works to Mr. Edward Roberti?     A. Yes.

Q. And who was present?

A. Well, Mr. Roberti and Mr. Fox; and passing

(Testimony of Joseph F. Avrill.)

in [99] and out probably to get an order and deliver a bill or something of that kind.

Q. Do you have any recollection or do you know whether Mr. Edward Roberti saw this mattress more than once?

A. Well, during the course of two weeks he was over there, I should judge, about five times, in a few weeks time.

Q. Did you have any conversation with Mr. Fox as to why he explained it to Mr. Roberti?

A. I told him that he shouldn't explain it to anyone until we had it protected. He said he didn't think anyone would interfere with it in any way.

Q. Now just when did this conversation referred to take place, with Roberti?

A. Well, I couldn't state that. It probably was in November or December of the same year, 1914.

Q. How long were you with the Imperial Cotton Works at this new location?

A. I think it was on the 11th of February, 1915, that they went into the hands of a receiver in bankruptcy. About that. I think it was the 11th of February, 1915.

Q. Then what did you do?

A. I was left in charge of the machinery by Mr. Sam Fox, who was also interested in the Imperial Cotton Works. They had moved the stock of materials to another building and left the machinery there, and he left me there as a kind of watchman to look after it for two weeks. [100] After that—oh, probably six or eight months—or I think it was

(Testimony of Joseph F. Avrill.)

a year—nearly a year—I went to San Diego. There I worked for the Garrettson Manufacturing Company.

Q. Did you manufacture any mattresses in accordance with your invention?

A. We made a mattress according to this exhibit here.

Mr. BROWN.—Referring to Defendants' Exhibit "B."

Q. Now, please state the difference, if any, that existed between the mattress shown in the drawing Defendants' Exhibit "B" and the model of the mattress exhibited on the show-rack at the Imperial Cotton Works at Los Angeles and which Mr. Edward Roberti saw.

A. Well, this mattress had a separate piece of ticking—if I remember right it was about 7 ½ inches long—doubled over, and one end of it was fastened to the upper cover with an eyelet, and where it was doubled over two open ends were sewed to the upper tick about a half inch away from the eyelets, leaving a loop underneath of about half to three-quarters of an inch deep. The needle was passed through that loop the same as the other and down and back up again and tied and the knot slipped inside.

Q. Now according to Defendants' Exhibit "C" did you manufacture any model or full size mattress or sell any mattresses in accordance with the drawings shown in said exhibit?

A. Yes, we manufactured quite a few. In fact I made [101] some and had them taken to my



(Testimony of Joseph F. Avrill.)

own house and used as an experiment to try; and we found that the eyelets wouldn't hold, that they would pull through the upper cover, and we abandoned that and took up this other. We made several and sold them.

Q. Now, when did you make them, and where?

A. During 1916, in San Diego, for the Garrettson Manufacturing Company.

Q. How many mattresses did you manufacture in accordance with your invention to which you have testified and in accordance with Exhibit "B" while with the Garrettson Manufacturing Company?

A. Well, I couldn't state. I should think, though, about 150.

Q. That was in accordance with Exhibit "B" or Exhibit "C"?     A. Exhibit "B."

Q. Did you sell them?

A. They were sold by the Garrettson Manufacturing Company.

Q. Do you know where the mattress is located that was formerly on the show-rack of the Imperial Cotton Works?     A. I do not.

Q. Have you made any attempt to locate the same?

A. No, I don't think I could locate it. I haven't tried.

Q. Would you know where to look if you tried to locate it?

A. Well, the only place I could see, the Board of [102] Trade had charge of the sale, and they

(Testimony of Joseph F. Avrill.)

had the sale at Twelfth and San Julian; but I was not there at the sale and don't know who bought it.

Q. How far distant, if you know, was the factory of Roberti Brothers from the Imperial Cotton Works after you moved to the second place?

A. Well, it would be about two blocks and a half.

Q. Do you know Mr. Edward Roberti or Mr. August Roberti? A. I do.

Q. Are they present? A. Yes.

Q. Were you ever in their factory? A. Yes.

Q. When?

A. Well, I worked for them in the early part—I should say about the middle—of 1910. Perhaps it was in September, 1910.

Q. And when did you leave their employ?

A. Well, I left them and went to work for Mr. Fox, afterwards being with Mr. Fox a month, or a few months, I couldn't say exactly.

Q. Do you know a Mr. Joe Scanlon?

A. Yes; John Scanlon.

Q. Did you ever have any conversation with Mr. Scanlon in regard to your mattress?

A. Yes. During the time that I was appointed as [103] watchman over that machinery in 1915 I ran across some eyelets which were left there and I took a sample to Roberti Brothers to see if they would buy them, but they said they couldn't use them; and in going in there I happened to see a mattress come down the chute from the finishing department and I was looking at it and it looked familiar, and just then Mr. Scanlon came down

(Testimony of Joseph F. Avrill.)

and we both smiled. He says, "We are getting it." I says, "I see you are."

Mr. GRAHAM.—I move to strike out that portion of the witness' answer referring to anything said by Mr. Scanlon, as hearsay.

Q. (By the COURT.) Do you know what Mr. Scanlon's connection with the place was?

A. He was at that time foreman of Roberti Brothers.

The COURT.—The motion is denied.

Q. (By Mr. BROWN.) Now, I will ask you to compare the mattress structure that you manufactured while with the Imperial Cotton Works, and which was on the show-rack, with Plaintiffs' Exhibit No. 4, being the mattress now manufactured and represented to be a "Sanotuf" mattress, and explain where, if any, differences exist.

A. (Examining Exhibit 4.) Well, my strip was fastened through the eyelet alone, while this is sewn down with stitching.

Q. You mean the cross-strip?

A. The cross-strip was fastened only with an eyelet to [104] the ticking, while this is sewn down.

Q. In what other particulars was there a difference?

A. Well, that is practically all I can see, only I would call this an improvement over mine in the way of its being sewed.

Q. Then the only difference between your mat-

(Testimony of Joseph F. Avrill.)

tress and the Roberti mattress as shown here resides in the sewing?

A. Well, they have this extra tab, while I used this long strip instead, using it in a hook shape and catching it in a double loop.

Q. Similar to the showing of Exhibit "B"?

A. Yes.

Q. And how did you secure these strips on the interior of the mattress? A. On Exhibit "B"?

Q. No, on the mattress you made at the Imperial Cotton Works.

A. They were fastened with the eyelets (indicating).

Q. I don't mean that. On the inside.

A. They were tied with twine down through to the loop that was left there, passed down through the further one and back up again and tied with a knot and slipped through.

Q. In other words, it would be the same construction, practically, with the exception of the stitching? A. Yes.

Q. Were you ever involved in any interference proceedings [105] in the United States Patent Office with Edward Roberti and August Roberti?

A. Not that I know of.

Q. I show you Defendants' Exhibit "E" and ask you to examine same and if you know anything concerning the same.

A. That is what they would call Garrettson trying to show authority to the former patent.

(Testimony of Joseph F. Avrill.)

Q. Do you wish to correct your former statement, then, that—

A. I didn't understand what— This is correct, but I thought you meant whether I had been, plainly speaking, sued.

Q. No, an interference proceeding. I asked you whether either one of your applications for patent was ever involved in an interference proceeding.

A. Either one of what patents?

Q. Whether either Exhibit "B" or Exhibit "C" was ever in interference with any application of Edward Roberti or August Roberti—any interference proceeding in the United States Patent Office to determine priority of invention.

A. Well, I don't quite understand that.

Q. Have you ever had any conflict with any other application for patent in the United States Patent Office when you filed your application for patent?

A. Maybe I could explain myself by telling you that I explained these matters to the Garrettson Manufacturing [106] Company and they got a lawyer and a patent attorney to dig into the records at Washington, the Patent Office, and prove that I had manufactured this mattress previously. That is as far as I can explain it.

Q. Did you know that Edward Roberti and August Roberti had obtained a patent on a mattress? A. Yes.

Q. Have you ever received any patent for a mat-

(Testimony of Joseph F. Avrill.)

tress in accordance with Exhibits "B" and "C," or were those applications abandoned?

A. This one was abandoned. They were both abandoned on account of the firm going out of the business along about the time they were issued. That is, there was one patent that came to the office some time in May, I think, and they didn't think they would spend any more money on it, and there was a final fee of \$25, because they figured on going out of business anyway.

Q. Were you paying for your applications?

A. No, the Garrettson Manufacturing Company.

Q. And they were abandoned with your consent?

A. Yes.

Q. At your direction?

A. Well, I had no means of carrying it on myself, and I just abandoned the whole thing as it was.

Q. After you left the Garrettson Manufacturing Company what did you do?

[107] A. Well, I came to Los Angeles.

Q. And with whom did you associate?

A. Well, I was in quite a number of different things. I drove a bread wagon, for one thing.

Q. Did you ever manufacture a mattress in accordance with your invention or in accordance with Exhibits "B" and "C" after leaving the Garrettson Manufacturing Company?

A. No, I never have.

Q. Why not?

A. Well, I was for three years in the Southern

(Testimony of Joseph F. Avrill.)

California Iron & Steel Company as night troubleman.

Mr. BROWN.—That is all.

Mr. GRAHAM.—If the Court please, we would like to call Mr. Wider and excuse this witness temporarily.

The COURT.—Very well.

(Witnesses Wider and Max Jonas examined at this point; their testimony appearing following that of the present witness.)

Cross-examination.

(By Mr. GRAHAM.)

Q. Mr. Avrill, I call your attention to Defendants' Exhibit "B," the mattress shown in the drawing, and ask you how long prior to the time you signed application papers did you make one of those mattresses (handing exhibit to witness).

[108] (Witness examining Exhibit "B.")

Q. Without referring to the dates on there, but from your independent recollection.

[109] A. I made the mattress first, before I ever applied for patent.

Q. How long prior to the time that you signed your application papers did you make the mattress?

A. Well, when was this (examining Exhibit "B")—

Q. I am asking you for your recollection.

A. Well, I don't know when this paper was issued.

(Testimony of Joseph F. Avrill.)

Q. You remember signing the application for patent, don't you? A. Some time during 1916.

Q. Well, when did you first make one of those mattresses?

A. The first time I ever made one anything like it was about 1914, about the latter part of 1914.

Q. You say you "made one anything like it."

How near like it was the mattress you made in 1914?

A. Well, I should say it would be practically like this (referring to Exhibit "B").

Q. Well, what were the differences?

A. I can't see any difference.

Q. Then are you willing to swear that the mattress you made in 1914 was identical with that shown in that drawing?

A. Well, I am not thoroughly versed in blueprints and drawings. I don't understand these dotted lines. [110] What do they mean? Whether they mean stitching or sewing or what they mean.

Q. Well, then, as a matter of fact you are not able to say that the mattress you made in 1914 is not like that shown in that drawing; is that correct?

A. I am able to say that I made one with strips running the length of the mattress and being tied with eyelets, leaving a loop. This loop was connected from both sides with the twine being run through the eyelets with a needle.

Q. Now when did you make that in 1914?

A. I think it was in October.

Q. How do you fix that date?



(Testimony of Joseph F. Avrill.)

A. Well, business was bad at that time of the year.

Q. But you are quite positive it was in October?

A. Well, I—I think it was in October.

Q. Then you don't know whether it was in October or not; is that correct?

A. It was in the latter part of the year. It was chilly mornings and chilly evenings.

Q. Back in 1914? A. Yes.

Q. You are willing to say that because it was chilly in the morning and chilly in the evenings that you made that mattress in the latter part of the year [111] 1914?

A. No, not exactly on that.

Q. Then how do you fix the date?

A. Well, if I go forward to about the 11th of February, 1915, I can figure back.

Q. All right; now take the 11th of February, 1915. What occurred at that time?

A. The Imperial Cotton Works went in the hands of the Board of Trade.

Q. Now figure back. What was the next event prior to that by which you can fix any date?

A. Well, Christmas.

Q. What happened at Christmas time?

A. I got a necktie from the firm.

Q. From the firm you worked for? A. Yes.

Q. What connection did that have with making the mattress?

A. Well, he showed appreciation for what I tried to do.

(Testimony of Joseph F. Avrill.)

Q. For making a mattress he gave you a neck-tie?

A. No, not for making the mattress, but he showed his appreciation at that time of the year for what I had done during the year.

Q. Now how does that refresh your recollection as to the date you made the mattress? Was it prior [112] to that?

A. Well, we were generally busier in the fall than any other time of the year.

Q. In your direct testimony you said you made the mattress some time in October. A. Yes.

Q. Now how do you fix that date?

A. Well, as a rule we were very busy in the fall, and this being a bad year we were not quite so busy.

Q. Then you were so busy in the fall and not in the winter? A. In the fall, about October.

Q. You are quite positive it was about October?

A. About October.

Q. Do you recall ever making a sworn statement and sending that statement to the Patent Office regarding the manufacture of this mattress in Exhibit "B"? A. Yes, sir.

Q. Were the statements that you made under oath at that time true and correct?

A. As far as I know.

Mr. BROWN.—Referring to the preliminary statement.

Q. Is that a reproduction of your signature [113] (exhibiting paper)? A. Yes.

(Testimony of Joseph F. Avrill.)

The REPORTER.—What document is that, Mr. Graham?

Mr. GRAHAM.—Exhibit “F,” I believe.

Q. (By Mr. GRAHAM.) Now when did you first think of making this mattress?

A. Some time during 1914.

Q. Well, when during 1914? It is very important to fix these dates, and I want your best recollection.

A. Well, I couldn't place it any closer than October. It was about that time.

Q. You think it was in October? A. Yes.

Q. In this preliminary statement, this sworn statement of yours that I have referred to, Exhibit “E,” I find the following statement: “That he (meaning yourself) conceived the invention set forth in the declaration of interference on or about the 5th day of December, 1914; that on or about the same date he started making a complete mattress of the said invention and finished it a few days later; that on or about the 15th day of December, 1914, that after it was finished, he placed it in the showroom of the Imperial Cotton Works in the City of Los Angeles.” Now, which statement is correct—this statement that you have made in this preliminary statement sworn to by you on [114] the 23d of February, 1917, or your statement that you have made on the stand to-day?

A. Well, I think the October date is, as nearly as I can recollect, the correct date.

Q. I call your attention again to the fact that

(Testimony of Joseph F. Avrill.)

this sworn statement of yours in the Patent Office was made on the 23d day of February, 1917. This is 1924. A. 1917?

Q. Now bearing that in mind do you think your recollection is better to-day than it was in 1917?

A. It is just as good.

Q. Then which one of these statements is correct?

A. Well, I couldn't prove the October date, because I have no proofs. This thing can be proven by my signature only.

Q. How can you prove this?

A. Well, my signature is there.

Q. Simply because it is your signature? You have no way of fixing the date except that you have signed a statement in 1917 to that effect?

A. That is all.

Q. Was that first mattress that you made a complete mattress? A. Yes.

Q. And that was the mattress that went to the Imperial Cotton Works? [115] A. Yes.

Q. Now, calling your attention to Defendants' Exhibit "C," when did you first make a mattress like that shown in Defendants' Exhibit "C"?

A. (Examining exhibit.) That was made about the same time, prior to the one—or about the same time as the one in Exhibit "B." I think that is the one.

Q. Isn't that the one you made at the Garrison Manufacturing Company's plant?

A. Exhibit "C" was made first.

Q. Where was that made?

(Testimony of Joseph F. Avrill.)

A. At the Garrison Manufacturing Company at San Diego.

Q. You didn't go to the Garrison Manufacturing Company until 1916, did you? I am asking you to testify from your recollection.

A. I went there in 1916, yes.

Q. You made that mattress first in 1916. Then you didn't make any mattress prior to 1916; is that correct?

A. I made the other one in the Imperial Cotton Works in 1914.

Q. Then you made that shown in Exhibit "B" first; is that correct?

A. There is no exhibit on the first one, only this interference here (witness handling papers). [116] That shows it here. This is the one I have reference to that I made first (handling documents).

Q. Well, that has no picture on it at all, has it, the one in interference? I am referring to these marked Exhibit "C."

A. That was made in San Diego in 1916.

Q. Well, which one was made in 1914—Exhibit "B"?

A. The one explained in this interference, with the long strips.

Q. That is the same as that marked Exhibit "B," is it not?

A. No. These were short strips sewed and fastened with eyelets; the other was one continuous strip fastened only with eyelets.

Mr. GRAHAM.—If the Court please, there are

(Testimony of Joseph F. Avrill.)

a lot of those exhibits put in evidence here at the same time, and it is almost impossible to examine the witness fully with reference to them at this time. I have a certified copy of this application which is not like the certified copy that was put in evidence, although they both bear the same numbers.

Mr. BROWN.—The one we put in is a photographic copy.

Q. (By Mr. GRAHAM.) Now this document marked Exhibit "B," you have testified that that is not the one that was in interference or with which you made the [117] sworn statement; is that correct? A. Which?

Q. This document marked Exhibit "B," you say that is not the one to which your sworn statement referred? A. That is similar to it, yes.

Q. Isn't that the one?

A. If that has the long strip running parallel.

Q. Now, Exhibit "E" is the sworn statement I have referred to, and I call your attention to the fact that it is marked Interference No. 41,009. Referring to Exhibit "B," I call your attention to the reference to the interference as bearing the same number—41,009. Now do you still say that this sworn statement does not refer to that application (handing papers to the witness)?

Mr. BROWN.—We object to that on the ground that it calls for secondary evidence. The best evidence consists of the written documents, particularly after this lapse of time.

(Testimony of Joseph F. Avrill.)

The COURT.—He may give his understanding of it if he has any.

A. Well, I don't—there were two applications made for patent. This is one of them and there was another. That interfered with the Roberti patent I suppose. (Examining documents.)

The COURT.—Well, if you can't tell, that is a [118] sufficient answer.

Q. (By Mr. GRAHAM.) Referring to Exhibit "B," which is right before you, as I understand that is the mattress that you made first. Is that correct? A. No, it is not.

Q. Well, which one was it you made first?

A. The one on the other page.

Q. Which one is that?

A. This one here (indicating).

Q. Well, that is the one shown in Exhibit "B"; is that correct?

A. Well, there is more than one shown in Exhibit "B." There are two shown here.

Q. Then it was one of the mattresses shown in the drawings annexed to and forming a part of Exhibit "B"; is that correct?

A. They were both made, but this is the first one made and this is the next one made (indicating). They are not both the same.

Q. Referring to what figure?

A. This. If I understand it right, this has a strip—that these dotted lines indicate a strip going the full length, and this indicates a strip, this double fold here, with the eyelet running through, and this

(Testimony of Joseph F. Avrill.)

is the loop; then that is the one I made in 1914 at the Imperial Cotton Works. This is the one I made [119] in San Diego with the short strip doubled over and sewn with a machine and fastened with an eyelet there and connected with a string between the two. There are two different mattresses.

Mr. GRAHAM.—The witness first refers to figures 1 and 2, and in his subsequent description to the figures marked 3 and 4, as showing two different types of mattresses, in Exhibit “B.”

Q. Now, referring to Exhibit “C,” when did you make a mattress like that (handing paper to witness)?

A. That was made in San Diego in 1916, at about the same time; or in fact this second one.

Q. Then it was made after the first one, but before the mattress shown in figures 2 and 4 in Exhibit “B”; is that correct? A. Yes.

Q. Have you made any effort to get any of those mattresses that you made in 1916 or before?

A. I have not.

Q. How many mattresses altogether were made, Mr. Avrill, according to your drawings or plans?

A. Well, I couldn't state any amount because I didn't know. I didn't have charge of the shipping nor of the books.

Q. This first one that was made and put in the Imperial Cotton Works, was that ever actually used for a mattress?

[120] A. It was put in the display rack.



(Testimony of Joseph F. Avrill.)

Q. Then it was not even tested, that mattress, was it? A. Well, what do you mean by testing?

Q. Put into ordinary use such as a mattress is used for.

A. We have other ways of testing them besides sleeping on them.

Q. Well, was it ever put into actual service?

A. No.

Q. It was simply put on a display rack?

A. Yes.

Q. Now, when were the first mattresses made that were actually made and sold; do you recall that? A. They were made in San Diego.

Q. And you went to San Diego in 1916?

A. Yes.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—That is all.

## TESTIMONY OF FRED W. WIDER, FOR PLAINTIFFS (RECALLED).

[121] FRED W. WIDER, recalled as a witness on behalf of plaintiffs, having been previously sworn, testified as follows:

### Direct Examination.

(By Mr. GRAHAM.)

Q. Mr. Wider, you testified this morning that certain representations were made to you by a man who represented himself to be one Jonas. Is that correct? A. Yes.

(Testimony of Fred W. Wider.)

Q. Do you recognize that person in the room at the present time?     A. Yes, sir.

Q. Will you point him out?

A. He is sitting in the second seat at the end.

Mr. GRAHAM.—Will you stand up, Mr. Jonas, please?

(Man stands.)

Q. Is that the gentleman?     A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—May we not put Mr. Jonas on right now so as to clear this matter up?

The COURT.—Very well.

#### TESTIMONY OF MAX I. JONAS, FOR DEFENDANTS.

[122] MAX I. JONAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

##### Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name?     A. Max. I. Jonas.

Q. Did you at any time ever call on the witness Mr. Wider who has just left the courtroom here?

A. Yes, sir; twice.

Q. In connection with the business of Jonas & Sons?     A. Yes, sir.

Q. On any such occasion did you ever represent to Mr. Wider or anybody in his place of business that the defendants could furnish mattresses like the "Sanotuf" mattresses of the Roberti people?

(Testimony of Max I. Jonas.)

A. No, sir, I never did.

Mr. GRAHAM.—That is objected to as leading and instructing the witness. The question should call for the conversation that took place and let the witness state it in his own words.

The COURT.—I think the question would be proper. The objection is overruled.

Mr. GRAHAM.—Exception.

[123] Q. (By Mr. BLAKESLEE.) Did you ever represent to that witness Wider or anybody in his place of business or connected with him in business that the defendants could furnish “Sanotuf” mattresses? A. No, sir.

Mr. BLAKESLEE.—That is all.

Q. (By Mr. GRAHAM.) Did you ever represent that the mattress made by the defendants was the same like “Sanotuf”? A. No, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—May the record show that Mr. Jonas who has just testified is one of the defendants in the case?

Mr. GRAHAM.—Yes.

TESTIMONY OF EDWARD WILLIAM FOX,  
FOR DEFENDANTS.

[124] EDWARD WILLIAM FOX, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

(Testimony of Edward William Fox.)

A. Edward William Fox.

Q. What is your occupation, Mr. Fox?

A. Traveling salesman.

Q. Were you ever engaged in the manufacture of mattresses, comforts and the like?     A. Yes, sir.

Q. When?

A. From 1911 to 1915—the early part of 1915.

Q. Where?     A. At Los Angeles.

Q. And what was the name of the company?

A. The Imperial Cotton Works.

Q. And what was your connection with them?

A. I was general manager and principal stockholder.

Q. Did you have working for you at said place a man by the name of Joseph Avrill?

A. Yes, sir.

Q. Did he just testify? [125]     A. Yes, sir.

Q. How long was the Imperial Cotton Works in existence?

A. About five years; from 1911 to 1915.

Q. And where were they located in 1911?

A. At San Julian near Pico.

Q. And how long were they located there?

A. Three years.

Q. And then where did you go to?

A. To Sixteenth and Tennessee Streets at that time—Hooper Avenue now.

Q. Now, during the time they were located at the first address did Mr. Avrill construct any mattress which he claimed was an invention of his?

A. Yes, sir.

(Testimony of Edward William Fox.)

Q. What was such mattress?

A. It was a mattress that was made with eyelets and that was laced at the place of the tufting of the mattress. The lacing formed the "biscuits," as they term them, on a mattress without any tufts.

Q. Have you anything else to say as to the construction of that mattress?

A. The only thing that would be, the reason it was made in that style, at his suggestion, he made it, was that a mattress could be aired when getting flat and worn down; the mattress could be laid out in the [126] sun and air and the cotton would come back to life, and the lace put back again and the tufts or "biscuits" formed again. It was for the ventilation of the mattress.

Q. And what was done with that mattress after it was constructed?

A. It was placed in a salesroom.

Q. Now where was this mattress constructed—at your first or second address?

A. The lace mattress was constructed at San Julian Street—the first address.

Q. And in about what year?

A. It was either the latter part of 1911 or the first part of 1912.

Q. And it was placed on a display rack?

A. Yes, sir.

Q. For the view of salesmen and buyers?

A. Yes, sir.

Q. Do you know August or Edward Roberti?

A. Yes, sir.

(Testimony of Edward William Fox.)

Q. Did they ever call at your factory?

A. Well, Mr. Edward Roberti. I don't think I have ever seen Mr. August Roberti at the plant.

Q. Do you know of your own knowledge whether Mr. Edward Roberti saw such mattress constructed in accordance with Mr. Avrill's invention?

[127] A. I couldn't say that he saw the first one. He may not have.

Q. Did he see one such mattress?

A. He did at the new plant at 16th and Tennessee.

Q. When was that?

A. It was made in 1914. I couldn't state the exact date. I have been out of the mattress game since then.

Q. Have you any way of fixing that date?

A. No, sir, I have not.

Q. Was the mattress that Mr. Edward Roberti saw the same as the mattress that you had constructed at the first address you have mentioned?

A. No, sir.

Q. Did you have any conversation with Mr. Edward Roberti with reference to the mattress?

A. Yes. We were friends, and still are I guess.

Q. And what was said?

A. I showed him the mattress that was on display and explained as nearly as I could, not being a mattress maker, the construction of it, in a friendly manner.

Q. Do you recall any of your description given Mr. Edward Roberti? A. No, I do not.

(Testimony of Edward William Fox.)

Q. Have you described that mattress?

A. Well, as nearly as I could understand it, [128] not being a mattress-maker, I did.

Q. How did you describe it?

A. That it was made with eyelets for ventilation, and that there was a tie of some kind on the inside of the mattress to hold the filling.

Q. Did you see that mattress constructed?

A. No, sir.

Q. I show you Defendants' Exhibit "B" and also direct your attention to two drawings and will ask whether or not your description, the description you gave at that time, would coincide with any showing of the drawings, either one (handing document to witness).

Mr. GRAHAM.—That is objected to as leading and instructing the witness. He said that he didn't see the mattress constructed nor did he know the interior construction of it. Now in testimony of this nature it is the particular construction of the thing that counts and the witness has testified in fact that he did not know what that interior construction was.

Q. (By the COURT.) Did you know the interior construction of the mattress? A. No, sir.

The COURT.—The objection is sustained.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. BROWN.) You have no knowledge of your own, then, as to the construction of the mattress on [129] the display rack?

(Testimony of Edward William Fox.)

A. Except what my superintendent told me about it.

Q. Who was the superintendent?

A. Mr. Avrill.

Q. What did Mr. Avrill disclose to you?

A. That there was a tab inside holding the filling, and he showed me how the twine was taken through and tied and let go through the eyelet, so that nothing but the eyelet would show on top of the mattress.

Mr. GRAHAM.—We object to that and move to strike out the answer as hearsay and as not part of this suit.

Mr. BLAKESLEE.—One of our defenses is prior knowledge of any invention on the part of Mr. Avrill, and all of this testimony goes to show that Mr. Avrill had that prior knowledge and was the prior inventor—or tends to prove that—so that it is not within the hearsay rule.

Q. (By the COURT.) Did you explain to Mr. Roberti in the same terms that you had been told how it was constructed?

A. Well, I might have. I am not positive, because it was nine years ago.

Q. Substantially so or not? [130] A. Yes.

Q. Mr. Avrill told you how it was constructed; now did you repeat that to Mr. Roberti?

A. I would suppose I did.

The COURT.—The objection is overruled.

Q. (By Mr. BROWN.) While you were in the



(Testimony of Edward William Fox.)

mattress business did you ever invent a mattress of your own?

A. No, sir. I invented a comforter.

Q. What was that comforter?

A. A ventilated comforter with eyelets.

Q. How was it constructed?

A. On the same principle, except there was no tufting in it. The eyelet would hold both the top and bottom cloth together.

Q. The eyelet was in the top and bottom cloth?

A. Eyelets in both sides.

Q. And what did you do with it?

A. Applied for a patent.

Q. Did you get a patent?

A. No, sir. It was not granted.

Q. Did you ever make any of the comforts?

A. Yes, quite a few. While the application was pending we made quite a number of them.

Q. Were they sold? A. Yes, sir.

Q. Where?

[131] A. In Los Angeles and elsewhere.

Q. When? A. Most of them in Los Angeles.

Q. When? A. That was about 1911.

Q. Who made them?

A. Well, the people in the factory. I couldn't state who made it.

Q. What factory?

A. At the Imperial Cotton Works.

Q. For what purpose were the eyelets?

A. Ventilation only. Ventilation of the bedding.

Q. No interior construction?

(Testimony of Edward William Fox.)

A. Nothing but cotton batting. Just a plain comforter.

Q. You say the eyelets went through from cover to cover? A. Yes.

Q. They didn't ventilate, then, did they?

A. Yes, they ventilated the bed.

Q. Holes put in the shaft of the eyelet?

A. Yes, there were double eyelets—on both sides.

Mr. BROWN.—That is all.

[132] Cross-examination.

(By Mr. GRAHAM.)

Q. Referring to that eyelet, you mean there was a double eyelet in that that extended all the way through the comforter and clinched the upper and lower covers of the comforter?

A. Yes, there were two eyelets. One clinched into the other. The eyelet was the same on both sides.

Q. And it clinched the upper and lower tick together; is that correct? A. Yes.

Q. And this ventilation you speak of was through the comforter? A. Yes, sir.

Q. And not from the outside to the inside of the comforter? A. Through the comforter.

Q. There were simply holes through the comforter where those eyelets were; there were no inside ties or anything of that kind?

A. No, sir.

Q. Now when was it you had this mattress on display that Mr. Avrill made?

(Testimony of Edward William Fox.)

A. Which one are you referring to—the first or second one?

[133] Q. The second one.

A. Some time in the fall—October. I couldn't state the date exactly.

Q. Are you willing to say positively that it was in October?

A. Well, that would be pretty hard. I couldn't positively say, no.

Q. You have no way of fixing the date?

A. No, sir.

Q. It might have been later on that year, might it not?

A. It might have been in September, and it might have been in December.

Q. You don't know?

A. No, sir, I couldn't swear to that.

Q. Now this mattress that was made in 1911, I believe you testified, when you were in your first place of business, had no inside ties, did it?

A. No, sir; the lace took the place of a tie.

Q. In other words, it had eyelets in it and the string would go through one eyelet, out the bottom and across? In other words, it was a lace effect?

A. Yes, sir.

Q. There were no inside ties or tabs or anything of that kind? A. No, sir.

[134] Q. Who made that mattress?

A. Mr. Avrill.

Q. Now those two mattresses—the one you testified to as being the laced mattress made in 1911

(Testimony of Edward William Fox.)

and the mattress which you had on the display rack some time in the latter part of 1914—are the only two mattresses made by Mr. Avrill that you know of?

A. That is, out of the ordinary run of mattresses, yes, sir. We made all kinds of mattresses.

Q. But they were the only two mattresses in which eyelets were used? A. Yes, sir.

Mr. GRAHAM.—That is all.

### TESTIMONY OF JOHN SCANLON, FOR DEFENDANTS.

[135] JOHN SCANLON, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. John Scanlon.

Q. Where do you reside, Mr. Scanlon?

A. 6435 Fountain Avenue, Los Angeles.

Q. What is your occupation?

A. In the mattress renovating and upholstering business.

Q. Are you in business for yourself?

A. Yes. I have been, but I sold out about three weeks ago.

Q. Were you ever associated with the firm of Roberti Brothers? A. Yes.

Q. Who comprises that firm, do you know?

(Testimony of John Scanlon.)

A. Mr. Ed and Mr. August Roberti.

Q. Are they at present in court? A. Yes, sir.

Q. When did you first become associated with the firm of Roberti Brothers?

A. Oh, it was some time in 1910, about along in [136] June I think—May or June.

Q. And where? A. In Los Angeles.

Q. How long did you remain with them?

A. Well, I worked for them I guess, off and on, for about nine years.

Q. What was your position with them when you first became associated with them in 1910?

A. Mattress making; stitching.

Q. And when did you leave them first?

A. I left in the latter part of 1912; I think it was about in November or December. I went to another place.

Q. And what did you do then?

A. I went to work for L. W. Stockwell Company.

Q. And what business were they in?

A. Mattress manufacturers.

Q. And what did you do there?

A. Making mattresses.

Q. How long were you associated with the Stockwells?

A. Well, I went there about in either November or December, 1912, and I worked there all of 1913, and came back to Roberti Brothers in I think it was January or February, 1914.

Q. How do you fix that date?

(Testimony of John Scanlon.)

[137] A. Well, it seems like all the changes I ever made were around in the winter-time some time. I know it was either in January or February, 1914; I am very nearly certain of that.

Q. And what did you do when you returned to the firm of Roberti Brothers?

A. I took charge of the mattress department as foreman.

Q. Do you know a William Daniel?

A. William, yes. We always called him Rufus Daniel. That is the name I knew him by.

Q. Is he present in court? A. Yes, sir.

Q. Do you know of your own knowledge whether Mr. Daniel was associated with the firm of Roberti Brothers at that time?

A. Yes, he was there when I first came there, and he left and went to San Francisco.

Q. Was he at the firm of Roberti Brothers when you returned to that firm in 1914, in February or in January? A. No, he was not there then.

Q. How long did you stay with the firm of Roberti Brothers as foreman in the mattress department?

A. Up until about the latter part of September, I think, 1919.

[138] Q. When you first met Mr. Daniel at Roberti Brothers what was his occupation?

A. He was foreman of the mattress department when I came there in 1910.

Q. And do you know a Joseph Avrill who has just testified?

(Testimony of John Scanlon.)

A. Yes, sir, I know him.

Q. Was he ever associated at Roberti Brothers, of your own knowledge?

A. Well, the first time I ever met Mr. Avrill that I know of, he came there some time along—I don't know what year it was, but it seems like about 1910, I believe, or 1911—and I was kind of sick, so he worked in my place for a couple of weeks and I laid off. Then when I came back again I don't know where he went to. I can remember that incident anyhow because it was the first time I met him.

Q. Now in 1914 when you returned to the employment of Roberti Brothers what type of mattress were they manufacturing?

A. Well, just the ordinary run of mattresses. They made different grades of mattresses.

Q. What were some of the grades like?

A. Well, staple cotton, and short cotton, and floss, hair, and things like that, at different prices of course.

[139] Q. Were they tufted mattresses?

A. Yes. Well, everything was tufted.

Q. I call your attention to Plaintiffs' Exhibit 4. Were they manufacturing a mattress like that at the time that you returned in 1914?

A. No, they were not doing it then.

Q. Were you at the factory of Roberti Brothers when they first commenced to manufacture a mattress like Plaintiff's Exhibit 4?

(Testimony of John Scanlon.)

A. Yes, I was there when they first started to manufacture that mattress.

Q. When was that?

A. Well, that is the thing that—it seems to me it was in 1915 before we started to make them, that is, to get them on the market. They were making them some time, I think, before they ever got their patent. Of course their patent was applied for, as far as I can understand; I expect it was.

Q. Did you work on any such mattresses?

A. Yes. I used to make all the samples. Just the small forms to make the samples and things like that.

Q. Now, when you first commenced the making of a mattress like Plaintiffs' Exhibit No. 4 was it in the form in which it is in at present? Please examine that mattress.

[140] A. Well, before they put it on the market, before they got it well on the market, we did a little revising on it. There was very few of them went out only with the tabs on them, and of course the tabs didn't hold, and we decided a strip would be the next thing. There was very few of them sent out with just the tabs on them, because they didn't hold.

Q. Now the first form of mattress manufactured simply had tabs?

A. The first few we made just had tabs on, the samples.

Q. Where were the tabs located?



(Testimony of John Scanlon.)

A. Right under the eyelets.

Q. To what were the tabs connected?

A. Well, they were sewed across with the thread, you see, and it seems that in experimenting with them either Edward or August—I don't know which—figured out that the strip would be the best across, and of course it naturally was.

Q. And where was the eyelet located in the top?

A. Right where it is now. It was a little bit farther away from the strip. Of course it only took a little experimenting to put that eyelet up closer to pull it down tighter.

Q. How long were you experimenting on the mattress until you got it in final form such as shown [141] in Plaintiffs' Exhibit No. 4?

A. Oh, we were not very long doing that.

Q. Well, approximately how long?

A. Oh, two or three weeks I should judge. I don't think it was much more than that.

Q. Was anything said to you as to who invented the present form of mattress as shown in Exhibit 4?

A. No.

Mr. GRAHAM.—That is objected to as hearsay.

The COURT.—That is, you mean by some of the Robertis?

Mr. BROWN.—The plaintiffs, yes.

The COURT.—Yes.

A. No, nobody ever said anything to me about—you mean who—

Q. Did you do any of the inventing of that said mattress? A. No.

(Testimony of John Scanlon.)

Q. With whom did you discuss the said mattress at the Roberti factory?

A. I didn't discuss it any. August Roberti got the design, or got the idea, as I thought; I don't know how he got it or where; and we just made the mattress up.

Q. Now when this mattress first came to your attention did either August or Edward Roberti claim to [142] be the inventor of it?

A. I couldn't say which one was the inventor, but August and I worked the most on it. He would get the little samples agoing and I made it. That is, I made it out of cotton, and then they made forms, you see, just like these exhibits you see here and things like that.

Q. Well, did either of the Robertis at that time claim to be the inventor of this mattress?

A. Well, I always did think August was the one that invented it because he was the one that was doing the most work on it, he and I together.

Q. You have stated that the eyelets were farther away than their present location. Was it necessary to experiment as to the location of the eyelets?

A. Well, we put the eyelets so far away that when you would run your needle in it would pull the eyelet out; and some of the boys would put their needle in and bear down on the eyelet and pull it out, and by pulling it up closer you could get a shoot straight through; you could get it better, without straining the eyelets. It didn't take much experiment when we saw that.

(Testimony of John Scanlon.)

Q. Now do you penetrate the tab on the interior of the tick with a cord or needle?

A. Yes, the tab is put on there in such a way [143] that when the bed would run out the tab goes out with the bed; but in beating them out sometimes of course the tab is beat down with the cotton and you couldn't tell where it was located until you regulated it. Then when you regulate it out you can feel with your needle, as any mattress stitcher can, whether you are getting hold of it or not.

Q. Now, as a mattress-maker, I ask you if the eyelet were located at the stitching point while the tab is joined would the mattress function just the same? A. If the stitching is what?

(Last question read.)

A. I don't think I understand that.

Q. In other words, if, instead of locating the eyelet to one side of the stitching here, you locate it right in line with the stitching,—

A. Well, it would practically be the same thing.

Q. You would engage the tab just the same?

A. Yes. It is just a matter of getting hold of the tab, that is all. It is a question of whether the tab is in line there.

Q. And you experimented for three or four weeks before you finally located the exact position of that eyelet?

A. Well, not in that way. The tabs were put on first, and then the strip, and then it was just a

(Testimony of John Scanlon.)

[144] matter of a little experimenting where the eyelet was to go.

Q. Did you ever have any conversation with Mr. Roberti or either one of the Robertis as to the object they desired to accomplish with this new form of mattress? A. No, I did not.

Q. Do you know what result they were attempting to get or what result you were attempting to get for the Robertis in any work on these mattresses?

A. Well, I was working for their interests at that time.

The COURT.—He means what advantage was there in making a mattress that way.

A. Oh, anything that is new, or a patent, like that, of course it was an advantage to get it out if it was marketable or would sell.

Q. Was it any better than the mattresses?

A. Well, I think it was better in a way. It is a talking point.

Q. Well, in practical use was it any better? For the person that had to use it would they find it any better?

A. Well, I couldn't say that they would, no.

Q. (By Mr. BROWN.) Will that mattress stretch, such as shown in Exhibit 4?

[145] A. Well, I think any mattress that is tufted either inside or outside, when the ticking is drawn it will stretch.

Q. Would you say that the mattress shown in Exhibit 4 was a ventilated mattress?

(Testimony of John Scanlon.)

A. No, I wouldn't say it was ventilated. I wouldn't say any mattress was ventilated.

Q. And you would say that that mattress would stretch?

A. Any mattress that is pulled down and has dents in it would have to stretch. What I mean by dents is pockets.

Q. Now, I believe you said you worked with Stockwell. What Stockwell was that?

A. The L. W. Stockwell Company.

Q. And their business was mattress manufacturing? A. Yes.

Q. Was that the Stockwell that manufactured the Stockwell never-stretch mattress? A. Yes.

Q. Does that mattress stretch? Do you know that of your own knowledge?

Mr. GRAHAM.—That is objected to as immaterial.

Mr. BROWN.—It it a matter of degree, your Honor.

Mr. GRAHAM.—There is nothing here to show the construction of that mattress.

[146] The COURT.—The objection is sustained.

Q. (By Mr. BROWN.) Do you know of your own knowledge and is it not a fact that at the time you were with Roberti Brothers, at the time the mattress like Exhibit 4 was constructed, you were trying to find a mattress that would compete with other mattresses in the market?

Mr. GRAHAM.—That is objected to as incompetent, irrelevant and immaterial.

(Testimony of John Scanlon.)

The COURT.—The objection is overruled.

A. Yes, sir.

Q. (By Mr. BROWN.) Was there a demand for a better mattress?

A. Well, there was always a demand for anything better. The idea was at that time to get something to compete with the other mattress shops, or get something better, as a leader, as far as I could see.

Mr. BROWN.—That is all.

Mr. GRAHAM.—No cross-examination.

### TESTIMONY OF WILLIAM R. DANIEL, FOR DEFENDANTS.

[147] WILLIAM R. DANTEL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. William R. Daniel.

Q. Your occupation? A. Mattress-maker.

Q. And where do you reside? A. Fresno.

Q. Are you in business for yourself?

A. Yes, sir.

Q. How long have you been in business for yourself? A. Eight years.

Q. What business? A. Mattress business.

Q. Were you ever associated with the firm of Roberti Brothers? A. Yes, sir.

(Testimony of William R. Daniel.)

Q. Who comprised that firm, do you know?

A. Mr. August Roberti and Mr. Ed Roberti.

Q. Are they present here in court?

A. Yes, sir.

Q. When did you first become associated with the firm [148] of Roberti Brothers?

A. It was 1908 or 1909 I am not sure which.

Q. In what capacity?

A. As mattress-maker, and afterwards as foreman.

Q. And when did you leave their employment?

A. In 1913.

Q. During the time of your employment was there an Ella Green employed by the firm of Roberti Brothers? A. Yes.

Q. Was there an employee by the name of Joseph Avrill? A. Yes.

Q. Was there an employee by the name of John Scanlon? A. Yes.

Q. Now, during the time you were associated with the firm of Roberti Brothers did you invent a mattress? A. Yes, sir.

Q. I show you Defendants' Exhibit "D" and ask you if this is your signature (indicating).

A. Yes, sir.

Q. Do you recall whether or not you applied for a patent on your said invention of a mattress?

A. Yes, sir.

Q. And do you recall who the attorney was that you went to? A. Hazard & Strause.

Q. Now, who directed you to Hazard & Strause?

(Testimony of William R. Daniel.)

[149] A. Miss Ella Green.

Q. You asked her for the name of patent attorney? A. Of a patent attorney, yes.

Q. And then what did you do?

A. I went to Hazard & Strause and applied through them for the patent.

Q. Did you ever apply for any other patent?

A. No.

Q. Have you any patents? A. No.

Q. Have you ever dealt with any other patent attorney? A. No, sir.

Q. Did you ever construct a mattress in accordance with your invention? A. A model.

Q. And where did you construct it?

A. At home, in Los Angeles.

Q. Now, I ask you to please refer to this Exhibit "D" and ask whether or not you constructed your model in accordance with that showing (handing document to witness).

Mr. GRAHAM.—That is objected to as not the best evidence. He should first describe the construction without having a leading question and without the construction about which he is to testify being placed in his hands.

Mr. BROWN.—I will withdraw it.

Q. Regarding this model mattress manufactured for you, [150] please describe the same.

A. Well, it was a mattress with a tick as any ordinary mattress would be made, with strips sewed on the inside, bottom and top, and a hole poked over this strip, or by the side of them, and



(Testimony of William R. Daniel.)

a needle inserted through the top tick, caught into the bottom, into the strip that goes across, and down through the filling into the strip on the bottom part of the ticking, and then through the hole and back up the same as it went down. Then this twine was tied, pulled through the hole, and cut off.

Q. Now, when did you make this model—what year?    A. It was in 1913.

Q. And how do you fix that date?

A. Well, it was shortly before I quit Mr. Roberti, and I quit there in the spring of 1913, I think in May.

Q. What did you do with the model?

A. I left that with Mr. Smith.

Q. Have you that model?    A. No, sir.

Q. Have you looked for it?    A. Yes, sir.

Q. Do you know what has happened to it?

A. Through correspondence with Mr. Smith, he said it has been destroyed.

Q. Did you ever show that model to others?

A. Yes.

[151] Q. When?

A. Well, the first time was the day I got my receipt from Washington, D. C., with the serial number, and I had taken it over to the factory to Mr. Roberti, and I showed it to Miss Ella Green, Mr. Clark, Mr. August Roberti, and a Miss English, but I had forgotten her name.

Q. And what conversation did you have at that time?

(Testimony of William R. Daniel.)

A. Well, it was just merely showing them the mattress and showing them what I had applied for; that is, the construction of it; and that I had applied for a patent.

Q. Did you describe the mattress?

A. Yes, sir.

Q. I show you what purports to be a drawing and ask you if you know anything concerning the same. A. Yes, sir.

Q. What do you know?

A. I know that is the drawing that was made at Hazard & Strause's, patent attorneys' office, for the mattress that I applied for patent for.

Q. Is that the drawing that you showed at the time you explained your mattress?

A. This is the original drawing I showed to the people in the office.

Q. It was furnished you by Hazard & Strause?

A. Yes, sir.

Q. Did you show it to Ella Green?

[152] A. Miss Ella Green, Mr. Roberti, Mr. Clark, and the assistant bookkeeper—a lady.

Q. And when did you show it?

A. That would be the last of February or along in the first of March, 1913.

Q. I likewise call your attention to a description attached to this drawing and ask if that was likewise furnished to you by Hazard & Strause (handing same to witness). A. Yes.

Q. And do you know whether or not that descrip-

(Testimony of William R. Daniel.)

tion follows the drawing prepared by your patent attorney under your instruction? A. Yes, sir.

Q. And did you show the description as well as the drawing to Mr. August Roberti, Miss Ella Green, Mr. Clark and Miss English? A. Yes, sir.

Q. At that time did you describe the drawing and the mattress construction in detail to those present? A. Yes, sir.

Q. Did you state how the mattress was put together? A. Yes sir.

Q. Do you recall any conversation or remarks made by Mr. August Roberti?

A. No, I can't say that I can more than he looked at it and said it looked all right; but he didn't take practically [153] any interest in it. My object in taking it over there was to see if he would be interested in it and sell it to him if I could.

Mr. BROWN.—I wish to introduce this drawing and specification in evidence at this time as fully identified, and as Defendants' Exhibit "T."

The COURT.—It may be filed.

Mr. GRAHAM.—How much of this is introduced?

Mr. BROWN.—Just the specification and the drawing.

Mr. GRAHAM.—Do you claim there is any difference between this and the specification and drawing as filed in the Patent Office?

Mr. BROWN.—Not between that and the certified copy.

Mr. GRAHAM.—In other words, you simply

(Testimony of William R. Daniel.)

wish to show that this is a particular paper that was shown by him?

Mr. BROWN.—Yes.

Q. Did you at any time show your invention or model or application papers or the drawing to anyone else other than Mr. August Roberti?

A. I think I showed it to Mr. Smith; and the model was seen by several mattress-makers that worked in the factory.

Q. Did you obtain a patent on this mattress?

A. No.

Q. Is it abandoned, do you know?

A. I don't know.

[154] Q. Were you ever notified that it was abandoned? A. No.

Q. Your attorney never informed you as to any abandonment of your application for patent?

A. No.

Q. When did you first learn that your application was abandoned?

A. Mr. Alexander came up to Fresno a few weeks ago and informed me of the suit between Roberti and Jonas, and that is how I found it out.

Q. Have you taken any steps to revive your abandoned application? A. No.

Q. Do you intend to do so? A. Yes, sir.

Q. And you didn't instruct your attorneys to abandon the application for patent?

A. Oh, no.

Q. Now, I will ask you to take your structure as shown in your patent drawing and point out the

(Testimony of William R. Daniel.)

differences, if any, between such structure and Exhibit 4, being the exhibit of plaintiffs.

A. Well, the strip in here has a tab where mine has not (indicating on document). My twine catches through the strip instead of through the tab. We merely sew a strip on there and then sew a tab on to the strip, and then [155] catch through the tab; where mine is a longer strip, practically the same distance as their tab and strip together, and I catch through the strip.

The COURT.—Make a loop out of the strip?

A. No loop. We catch into the bottom part of that strip as nearly as we can.

Q. (By Mr. BROWN.) Then there is no difference, to your knowledge, between the showing of the drawing of your mattress and Plaintiffs' Exhibit 4, with the exception of the tab?

A. That is all I can see.

Q. Do you use a metal eyelet in the tick?

A. No, sir.

Q. What do you use?

A. I made a hole with the regulator the size of—it will be about a quarter of an inch across—just about the size of this eyelet; then afterwards I would scratch that and that would make a plain surface without any opening.

Q. What is the regulator?

A. It is what you use to get your mattress in condition to stitch the tuft after it is filled.

Q. Do you penetrate with the regulator the cross-strip? A. No, sir.

(Testimony of William R. Daniel.)

Q. What do you do?     A. The outside tick.

[156] Q. (By the COURT.) You use no needle at all?     A. A needle to carry the tuft.

Q. To carry the cord through?     A. Yes.

Q. You mean on the outside of the tick you press the tick fabric apart so as not to cut it?

A. That is right, with a round-pointed instrument.

Q. Have you ever seen one of the "Sanotuf" mattresses before to-day?     A. Yes, sir.

Q. Where?     A. In my shop.

Q. And for what purpose was it there?

A. The mattresses to be worked over.

Q. And when did you learn first that "Sanotuf" mattresses were being manufactured?

A. Well, I would think it was in 1915.

Q. And at that time would you suppose that your application for a patent was still pending in the Patent Office?

A. Yes. I don't think this was patented though (handling papers); I thought this was a "Sanotuf" copyright—the name copyrighted and not the way the mattress was made.

Q. You thought your application was still pending in the United States Patent Office?

A. Yes, sir.

[157] Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Did you ever make any inquiries as to whether your application was still pending or not?

(Testimony of William R. Daniel.)

A. No. Not after I left Los Angeles.

Q. When did you leave Los Angeles?

A. July 2, 1913.

Q. So since July, 1913, until 1924, you never made any inquiries about your application?

A. Not directly, but through Mr. Smith.

Q. What inquiries did you make through Mr. Smith?

A. He was in Los Angeles here and he would go and see Hazard & Strause, or was supposed to.

Q. Did he report to you?     A. One time.

Q. When was that?

A. Oh, I don't remember just the date. It would be sometime in the latter part of 1913.

Q. Then Mr. Smith was acting as your representative in negotiating with your attorneys; is that correct?     A. Yes, sir.

Q. Did he receive mail from you?

A. There were two that I know of.

Q. Two what?

[158] A. Two communications from—

Q. And you received those?     A. Yes, sir.

Q. And what was the nature of those communications?

A. Well, one was—I don't know how to explain it, but it was a communication from Hazard & Strause claiming that for some reason the patent would not be issued but they were, amending their first—well, the first application, and they thought they would get a more favorable reply. I believe that was just about—

(Testimony of William R. Daniel.)

Q. Now, when did you become interested in this matter again?     A. Three or four weeks ago.

Q. And how did you become interested?

A. Through Mr. Alexander.

Q. Where did Mr. Alexander see you?

A. At Fresno.

Q. Well, what did you do after you had a talk with Mr. Alexander?

A. I went to Mr. Cook, an attorney.

Q. And what did Mr. Cook tell you?

A. I went to him in regard to this mattress proposition.

Q. And he sent you somewhere else?

A. He advised me to come to Los Angeles and see a patent attorney here, someone that was not connected with [159] the case in any way, and get advice from him, and he suggested Lyon & Lyon.

Q. Did you ask anybody about your application?

A. I went to Lyon & Lyon, and he said he wasn't connected with it in any way, but he couldn't handle the case, and he advised me to come and see you. I went to see you and then I went to see Mr. Brown; so I saw you all.

Q. And what did you talk to me about?

A. About selling my rights in this mattress.

Q. Please state fully what your conversation was at that time.

A. The substance was if I had anything here and I had anything coming out of it I would like to know if I could get it. You called Mr. Roberti



(Testimony of William R. Daniel.)

and Mr. Roberti came, and he said if I had any rights in it it would be shown in court.

Q. To bring your claims to the court and if you had any claims they would be settled here?

A. It would be shown here.

Q. Now, you have never taken any steps aside from through Mr. Smith in 1915 to find out anything about your application? A. No, sir.

Q. You were not very much interested in it, were you?

A. Well, about \$110 or \$115 worth of hard earned money.

Q. But you were not interested enough to follow it up, [160] were you?

A. Well, I don't know—I didn't understand the proceedings of the Court or of patent attorneys.

Q. Well, you didn't think very much of this alleged invention yourself, did you?

A. Well, I didn't have much opportunity to find out whether it was any good or not.

Q. Were you not in the mattress business?

A. Yes, sir.

Q. Didn't you ever make any of these mattresses and sell them? A. No, sir.

Q. You simply made a model?

A. That is all.

Q. Will you please describe the way you put the ties in that model which you made?

A. Why, we inserted the needle through the upper tick, caught into the strip, and the same below, and came back through the same hole we started

(Testimony of William R. Daniel.)

through and tied the knot and then pulled it down through the hole and cut it off.

Q. Then what did you do after that?

A. It was all done then.

Q. Did you leave the hole open?

A. No; we had a regulator and scratched the hole and closed it up.

[161] Q. Then you don't have any permanent hole in the tick, do you? A. No, sir.

Q. You simply make a hole to get the knot through? A. Yes, sir.

Q. And then close the hole up? A. Yes.

Q. And haven't any permanent opening in either the upper or lower tick member? A. No, sir.

Q. Do you have any tabs in there? A. No, sir.

Q. And you made that model that you spoke of at home? A. Yes, sir.

Q. I call your attention to Defendants' Exhibit "D"—

The COURT.—You probably will not be able to finish your cross-examination to-night. I think it is the plan that the Court should adjourn during some portion of to-morrow at any rate by reason of President Wilson's funeral. I think we will hold a morning session and then adjourn for the afternoon. We will go on in the forenoon, but it will be understood there will be no session in the afternoon.

(An adjournment was thereupon taken until Wednesday, February 6, 1924, at ten o'clock A. M.)

(Testimony of William R. Daniel.)

[162] Wednesday, February 6, 1924, 10 A. M.

WILLIAM R. DANIEL (recalled) for further

Cross-examination.

(By Mr. GRAHAM.)

Q. Mr. Daniel, did you ever inquire of Mr. Smith about your application for patent? A. Yes, sir.

Q. And what did he tell you?

A. Do you mean about the model?

Q. No; about the application.

A. Oh, I can't tell you that. I don't remember.

Q. You don't remember? A. No, sir.

Q. Did he ever send you any correspondence about the matter? A. Yes, sir.

Q. Correspondence that he had received from the patent attorney? A. Yes, sir.

Q. And you don't recall whether you ever made any inquiries other than that from Mr. Smith about the application? A. No, sir.

[163] Q. What kind of a needle did you use, Mr. Daniel, in making that model which you spoke of? A. An ordinary mattress needle.

Q. How did you make the hole in the bottom of the mattress, or in the bottom of the tick?

A. With a regulator and I waxed the regulator and opened the hole.

Q. You never used any eyelets, did you?

A. No, sir.

Q. And you have never made any mattresses,

(Testimony of William R. Daniel.)

full-sized mattresses, embodying the invention that is set forth in your application for patent?

A. No, sir.

Q. And you have been in the mattress business ever since 1913? A. No.

Q. Have you been in the mattress business during any of that time? A. About eight years.

Q. When was that?

A. From eight years ago until now.

Q. And in that model you didn't have any loops or tabs, did you? A. No, sir.

Q. Mr. Daniel, after your conversation with me what did you do next? Who did you next see about this case? [164] A. Mr. Brown.

Q. Did you ever talk to Mr. Jonas?

A. After I talked to Mr. Brown, yes.

Q. Didn't I understand you to say that you were attempting, or made an offer to sell something with respect to this invention of yours?

A. If I had anything coming, yes; if I had any rights I wanted to get what I had in it out of it.

Q. Did you make any disposition or agreement with Mr. Jonas regarding your papers showing your application?

A. I don't know that Mr. Jonas ever saw the papers.

Q. Well, did you make any agreement with him?

A. None whatever in regards to me testifying here.

Q. Did he make any offer of any kind to you if you would testify here?

(Testimony of William R. Daniel.)

A. He was to pay my expenses, of course.

Q. And what else?     A. In what way?

Q. Didn't he agree to pay the expenses in connection with the renewal, or attempted renewal, of your application?

A. If it is to be renewed he will pay the expenses for it, yes.

Q. Anything in addition to that?     A. Sir?

Q. Anything in addition to that?     A. No.

Mr. GRAHAM.—That is all.

[165] Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, in regard to your testimony given yesterday, did I understand you to say that the opening in the tick was not permanent?

A. It is put in with a regulator and that opens the goods. It is not sewed up. It is still there but it does not stand open as they do with an eyelet in it.

Q. But the opening is there all the time?

A. The opening is there.

Q. (By the COURT.) You work it back so that it doesn't show? Isn't your idea to work it back so that it doesn't show?

A. You can take a regulator and scratch it. The goods is not cut.

Q. I say, isn't that your purpose?

A. Yes, sir, to close the hole.

Q. So that your endeavor is not to leave a hole there?     A. Yes, sir.

(Testimony of William R. Daniel.)

Q. (By Mr. BROWN.) Can you get the needle through the hole just as easily as if you had a metal binding? A. Yes, sir.

Mr. BROWN.—That is all.

Mr. GRAHAM.—Mr. Brown, did you put in evidence the certified copy of the application of Mr. Daniel?

Mr. BROWN.—Yes, sir.

[166] Recross-examination.

(By Mr. GRAHAM.)

Q. Is that your signature? A. Yes, sir.

Q. And that is the oath that you signed when you made that application for patent? A. Yes, sir.

Q. I call your attention to the page marked "3" in Exhibit "D," wherein it reads as follows: "This knot 18 is then passed through the opening 11, which latter opening and that formed at 15,"—in other words, the opening in the upper tick and the opening in the lower tick—"will entirely close in the usual mattress fabric without indicating the position of passage of the cord." You made that statement under oath at the time you made the application, did you not? A. I did.

Q. So, as a matter of fact, this opening that you have testified that you put in the upper and lower tick closes entirely, does it not?

A. It can be closed entirely, yes.

Q. It does close entirely?

A. It can be closed entirely.

Q. It was your intention that it should be closed entirely, wasn't it? A. If I wanted to, yes.

(Testimony of William R. Daniel.)

Mr. GRAHAM.—That is all.

[167] Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, referring to Exhibit “D,” and particularly to the drawing, did you describe all the forms of your invention to Mr. August Roberti?

A. Yes, sir.

Q. And I call your attention to figures 3, 4 and 5. Does that differ, the structure shown in said figures, from the showing in figures 1 and 2 of said application?

A. That showed how those tabs could be put on there. This is the tab. I didn't intend to use that unless this didn't work exactly right, but this was the most practical way to fix it with the strip and sewing through the strip, and I just put these in there just to illustrate how it is done, how the needle goes through there and how it catches into that strip that comes below.

Q. Did you describe the structure of figures 3 to 5 to Mr. Roberti?

A. Yes, sir; I described the whole thing to him. They could see this just as plain as could be and the sample was open where they could see where the twine comes into the strip the same as in these mattresses here.

Q. Did the needle penetrate the tab, as you call it, in figures 3 to 5?     A. Yes, sir.

Q. And do you call that a tab?

[168] A. No, sir.

Q. What is it?     A. I call it a strip.

(Testimony of William R. Daniel.)

Q. In figures 3 to 5?

A. Oh, in 3 and 5 you would call those—well, I would call that a tab.

Q. And the needle penetrated the tab?

A. Yes, sir.

Q. And did the cord?

A. The cord went around and tied just the same as in this tab and strip here.

Mr. BROWN.—That is all.

Recross-examination.

(By Mr. GRAHAM.)

Q. I call your attention to figure 1 of that drawing, Mr. Daniel, that part showing the tie in place. Is there any indication of an opening in the tick there?

A. Well, it don't show it in 1, no, but in 2 it does where your twine goes through.

Q. In figure 1 it shows the completed tick, does it not? A. Yes, sir.

Q. And it shows the hole, if there was any there—

A. "18" shows the hole.

Q. "18" shows a knot, doesn't it?

A. "18" shows where the twine goes through the tick.

[169] Q. In the specification in the part I referred to before on page 3 it says: "This knot 18." So that does not refer to any hole, does it?

A. Well, I can't say that, I don't remember, but just from the looks of this it looks—

Q. I call your attention to figure 5. That shows the tie in place and completed, does it not?



(Testimony of William R. Daniel.)

A. Figure 5, yes, sir. That is just to show how this in a small way, like figure 1, would be.

Q. It does not show any hole in the tick, does it?

A. No, sir. 2 shows it.

Q. This part that you have referred to as a tab, what is that?

A. It was just a piece of ticking sewed on to the cover.

Q. The drawing indicates a round piece of ticking? A. Yes, you could use it round.

Q. And it is sewed directly to the upper tick, is that correct? A. Yes, sir, with a pocket like to it.

Mr. GRAHAM.—That is all.

#### Redirect Examination

(By Mr. BROWN.)

Q. Mr. Daniel, referring to figure 2, does the cord in that showing pass through the upper tick?

[170] A. Yes, sir.

Q. And is number 11 an opening in that upper tick?

A. Number 11 is the opening, yes, sir.

Q. And is number 15 the opening in the bottom tick? A. 15 is the opening in the bottom.

Mr. BROWN.—That is all.

#### Recross-examination.

(By Mr. GRAHAM.)

Q. And those openings are there when the mattress is being made is that correct?

A. Yes, sir.

(Testimony of William R. Daniel.)

Q. And they are not permanent openings, are they?

A. They can be closed or they can be left open.

Q. Please answer the question. They are not permanent openings, are they?

A. I have never made any and put on the market, no.

Mr. GRAHAM.—That is all.

A. There was no chance to see whether it was to be left open or closed.

Q. (By the COURT.) The tendency would be in use for them to close? A. Yes, sir.

Q. They would work closed unless they were fastened open?

A. Yes, but they can be opened again.

[171] Q. Oh, yes, you can make a hole in a fabric, I suppose?

A. Yes, without cutting the goods.

Mr. BROWN.—That is all. Mr. Robbins, take the stand.

### TESTIMONY OF ANDREW I. ROBBINS, FOR DEFENDANTS.

[172] ANDREW I. ROBBINS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. BLAKESLEE.)

Q. Mr. Robbins do you reside in Los Angeles?

(Testimony of Andrew I. Robbins.)

A. In Inglewood.

Q. And your age is what?     A. Forty-six.

Q. And your business?

A. I am a buyer of the furniture department of The Broadway Department Store.

Q. At 5th and Broadway, Los Angeles?

A. 4th and Broadway.

Q. Have you bought for that store mattresses made by both the plaintiffs and defendants in this case, that is, the mattresses of the Roberti Company and also of Jonas & Sons?     A. I have.

Q. And they have both been sold through that store?     A. They have.

Q. At any time when the mattresses of defendants were sold to you, in any talk or discussion of same was any representation made that such mattresses were the product of the plaintiffs?

[173]     A. No, sir.

Q. Was any representation made at any such time that the products of the defendants were the same as plaintiff's products?     A. No, sir.

Q. Or that the products of defendants were "Sanotuf" mattresses?     A. No, sir.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. What was said the first time you were approached by defendants for the purpose of buying mattresses?

A. The defendant approached me with what he

(Testimony of Andrew I. Robbins.)

called his "Tiednotuf" mattress. I was rather reluctant to buy the mattress because we had had some little difficulty with a seemingly tied mattress such as the "Sanotuf," and I was somewhat under the impression that we got a better product in the old time way of making mattresses. He represented to me that he thought his process was of a little better type of tying than the people who made the "Sanotuf" mattress

Q. Is that all he ever said to you with reference to a comparison of the two mattresses?

A. That was all.

[174] Q. And are the mattresses that you bought from both the plaintiffs and defendants supposed to be the same grade of mattress?

A. No, not necessarily. I don't think that I ever bought any of the felted mattresses from the defendants I bought some silk floss or Kapot mattresses.

Q. Are they a higher grade or a lower grade mattress?

A. They are supposed to be rather a high grade mattress.

Q. In other words, it is the best mattress?

A. Well, it is a different type of material entirely and it would rate in comparison similarly to the better type of felted mattresses.

Q. Then for the same grade of plaintiffs' mattress and the same grade of defendants' mattress did you pay less for the defendants' mattress than you did for the plaintiff's mattress?

(Testimony of Andrew I. Robbins.)

A. The question is rather an unfair question from the standpoint of the fabrics being so diametrically different or opposite.

Mr. BLAKESLEE.—A little louder, please, Mr. Robbins.

Q. (By Mr. GRAHAM.) I asked you to compare the same grade of mattresses made by plaintiffs and defendants and to state whether or not you bought the defendants' mattress at a lower price than the plaintiffs'?

A. Never having bought them in that way I couldn't say.

Q. You will not say that you did not pay less for the defendants' than the plaintiffs', is that correct?

[175] A. I paid less for the defendants' mattress than I would have paid for the plaintiffs' Kapot mattress, had I been buying a Kapot mattress from the plaintiff at that time.

Q. Then as I understand your testimony you paid less for the defendants' than you did for plaintiffs' Kapot mattress, is that correct?

A. I paid less than I would have paid had I been buying the plaintiffs' mattress.

Mr. GRAHAM.—That is all.

#### Redirect Examination

(By Mr. BLAKESLEE.)

Q. You were subpoenaed to testify here, were you not, Mr. Robbins? A. Yes, sir.

Mr. BLAKESLEE.—That is all. Mr. Gaines, take the stand, please.

TESTIMONY OF WALTER O. GAINES, FOR  
DEFENDANTS.

[176] WALTER O. GAINES, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

## Direct Examination.

(By Mr. BLAKESLEE.)

Q. State your age, residence, and occupation, Mr. Gaines.

A. Twenty-nine years old; Assistant Buyer of the Furniture Department of The Broadway Department Store; residence, Los Angeles.

Q. You were subpoenaed to testify here?

A. Yes, sir.

Q. Did you ever buy any mattress products of the defendants in this case, Jonas & Sons?

A. I have.

Q. Over what period of time?

A. How long ago do you mean?

Q. During what period of time, beginning and ending?

A. Well, it is several months ago, the first purchase, and we haven't bought any other mattresses I would say, or I haven't anyway, in the last three or four months.

Q. Have you also bought mattresses from the plaintiffs, the Roberti people? A. We have.

Q. And handled both at the same time?

A. No, sir.

[177] Q. Which are you handling now?

(Testimony of Walter O. Gaines.)

A. We haven't either.

Q. Which did you buy last?

A. The floss mattress from Jonas.

Q. Were those bought upon the solicitation of orders by salesmen from the defendants, the Jonas people?

A. The first purchase Mr. Robbins made. I didn't make the first purchase. I merely followed in with orders that came from the sample.

Q. Did you come in contact at all with the defendants or their salesmen in these transactions?

A. I have talked with Mr. Jonas, Sr.,

Q. At your place of business? A. Yes, sir.

Q. Did he, or any one representing the defendants, at any time make any representation to you in this connection that the mattresses of defendants were the same as the mattresses of plaintiffs?

A. No, sir.

Q. Or that the mattresses of defendants were the "Sanotuf" mattresses? A. No, sir.

Q. Have you anything to do with the sale of mattresses in your store? A. Well, partly, yes.

Q. Do you know anything about the representations [178] that have been made to the purchasing public regarding these mattresses of plaintiffs and defendants?

A. I have never talked it.

Q. You don't know anything about any such representations?

A. Nothing only the term used between the two, the "Sanotuf" and the Jonas mattress. As I under-

(Testimony of Walter O. Gaines.)

stand it, the Roberti mattress was called the "Sanotuf" and the Jonas mattress was called the "Tiednotuff" mattress.

Q. To your knowledge have any representations been made to purchasers of mattresses in your store that the "Tiednotuff" mattress, and the defendants' mattress, was the same as the "Sanotuf" or plaintiffs' mattress?

A. I can't say that I ever have, no.

Q. You know of no such representations?

A. No, sir.

Q. You gave no instructions that there should be any such?      A. No, sir.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. You didn't make the first purchase that was made by The Broadway Department Store from Jonas & Sons, did you?      A. I did not.

[179] Q. So you don't know anything about what representations were made at that time when you started buying the defendants' mattresses?

A. No, sir; I wasn't at hand at that time.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—Miss Green.



TESTIMONY OF MISS ELLA L. GREEN, FOR  
DEFENDANTS.

[180] Miss ELLA L. GREEN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Where do you reside, Miss Green?

A. In Los Angeles.

Q. And what is your occupation?

A. I am Assistant Secretary and Treasurer of The General Motors Finance Corporation.

Q. Were you ever associated with the firm of Roberti Brothers, mattress manufacturers?

A. Yes, sir.

Q. Do you know who comprises that firm?

A. Mr. August Roberti, Jr., and Mr. Edward Roberti.

Q. Are they present here in court?

A. Yes, sir.

Q. And when did you first become associated with the firm of Roberti Brothers?

A. I believe it was November 18th, 1908.

Q. And in what capacity?

A. Bookkeeper.

Q. When did you leave their employ?

A. About June 28th, 1914.

Q. During the time of your employment by Roberti [181] Brothers do you know of your own

(Testimony of Miss Ella L. Green.)

knowledge whether one William Rufus Daniel was employed by such firm?

A. Mr. Rufus Daniel was there.

Q. Is he present here in court?      A. He is.

Q. Is he the same Mr. Daniel who testified here this morning?      A. Yes.

Q. And do you know of your own knowledge what his position was with said firm?

A. Yes. When he first came there he was a mattress-maker and he afterwards was placed in the position of foreman in the Mattress Department.

Q. During the time that you were at the firm of Roberti Brothers did Mr. Daniel ever ask you for the name of any patent attorney?      A. He did.

Q. And do you remember when?

A. Well, of course I do not remember the day or the date but Mr. Daniel left probably about a year before I did and this was some time prior to that.

Q. And do you remember the name of the patent attorney?      A. I do.

Q. Who was it?

A. The first name was Hazard. I do not recall the last name. It was Hazard and somebody.

[182] Q. Did you have any other conversation at that time?      A. Yes.

Q. Do you recall what it was?      A. Yes.

Q. What was it?

Mr. GRAHAM.—I object to that, Your Honor, as hearsay.

(Testimony of Miss Ella L. Green.)

Mr. BLAKESLEE.—This is testimony as to disclosure and knowledge of invention pleaded as prior invention.

The COURT.—You may answer.

A. He came to the office and asked me to give him the name of a patent lawyer or attorney, and I told him I knew very little about such things but I would see what I could find. I turned to the classified part of the telephone directory and found several names there, and I said, “Well, this one seems probably to be about the best advertised.”

Q. (By Mr. BROWN.) Do you recall any conversation with Mr. Daniel concerning any long fibre cotton?

A. Well, I don't recall exactly the conversation but I remember Mr. Daniel purchased some there.

Q. How do you happen to remember that?

A. Well, they didn't handle a very great quantity of the long fibre white cotton and I was sort of provoked to think that one of the employees bought of it instead of saving it for some of our customers.

Q. Do you of your own knowledge know whether or not [183] he ever applied for any patent for mattresses?

A. Just how do you mean it? He did not tell me what he wanted with this firm.

Q. Did he ever show you any drawing or anything?

Mr. GRAHAM.—That is objected to as leading. Let the witness tell everything that took place.

The COURT.—She may answer.

(Testimony of Miss Ella L. Green.)

Mr. GRAHAM.—Note an exception, please.

A. Afterwards he brought some papers to the office, patent papers I suppose you would call them.

Q. (By Mr. BROWN.) Was there any drawing?

Mr. GRAHAM.—I move to strike the last part of the witness' answer.

The COURT.—It may be stricken as to what she supposed they might be called.

Q. (By Mr. BROWN.) Was there any drawing?

Mr. GRAHAM.—I object to the leading questions, your Honor. Let the witness describe what these papers were.

The COURT.—Yes. Tell what you saw in the papers.

A. They were blue-prints.

Q. (By the COURT.) Blue-prints of what? Could you tell?

A. Of some application for a patent.

Q. On what kind of an apparatus, if anything, if you could tell? A. Some kind of a mattress.

Q. (By Mr. BROWN.) At this occasion was anyone else [184] present? A. Yes, sir.

Q. Who? A. Mr. August Roberti.

Mr. GRAHAM.—Just a minute; it has not been shown where this conversation took place.

Q. (By Mr. BROWN.) Where did this conversation take place? A. In the office.

Q. Of what? A. Of their establishment.

(Testimony of Miss Ella L. Green.)

Q. Of the Roberti Brothers' establishment?

A. Yes, sir.

Q. Was anyone else present?      A. Yes.

Q. Who?

A. The assistant bookkeeper and probably one or two others.

Q. Who were the others? Do you recall?

A. I think Mr. Clark.

Q. Who was the assistant bookkeeper?

A. Minerva J. English.

Q. When was all this? Do you recall any date?

A. No.

Q. Or year, either?

A. No, but it was before Mr. Daniel left there.

[185] Q. Do you think that you could describe the drawing that you saw at that time?

A. Not in detail.

Q. Do you think you would remember it if you saw it?

A. I might remember something of it.

Q. I show you here a drawing, and will ask you if you recall or know anything concerning it, being Defendants' Exhibit "T"?

A. There are parts of it which seem familiar.

Q. What parts?

A. This part down here in figure 5.

Q. Do you note any difference between that which you saw at that time and the drawing there?

A. No; I couldn't say as to that.

Q. What do you remember about the drawing that you saw?

(Testimony of Miss Ella L. Green.)

A. Well, I remember that I saw the name "Hazard" at the bottom, and remarked something about his going to the parties that I selected.

Q. Who did you say was present on this occasion?

A. Mr. August Roberti and Mrs. Minerva J. English. I remember those two.

Q. Do you remember whether or not August Roberti was near Mr. Daniel at the time he was explaining his device?

A. Well, I remember he was near the drawing.

[186] Q. Where were Mr. Daniel and Mr. Roberti? A. In the office at the desk.

Q. At whose desk?

A. Well, there were two desks in the office.

Q. And he was at one of them?

A. Well, I never called it exactly my desk.

Q. Did you see Mr. Roberti looking at the drawing? A. I did.

Q. How do you happen to remember that?

A. Well, I recall his black head bent over the drawing.

Q. Did he look at the papers, do you recall, the application papers? A. I think he did.

Q. Do you recall whether or not Mr. Daniel had a model of a mattress at that time? A. I do not.

Q. Do you recall any conversation that Mr. Daniel might have had concerning his device to you directly at that time?

Mr. GRAHAM.—I object to that question as asking for a conversation that he might have had.

(Testimony of Miss Ella L. Green.)

If the witness can remember any conversation that took place let her state that.

The COURT.—She is asked if she recalls any. Do you? A. Will you please repeat the question?

Mr. BROWN.—Please read the question, Mr. Reporter.

(Question read.)

[187] The COURT.—That he did have. Do you recall any conversation that he did have?

A. Well, the remark was made something about “Now you see what I wanted with the white cotton; I wanted it for my model.”

Q. (By Mr. BROWN.) Who made that remark?

A. Mr. Daniel; something to that effect. I couldn't quote his words, of course.

Q. Do you recall any further conversation of that time that you heard? A. I believe not.

Mr. BROWN.—That is all.

#### Cross-examination.

(By Mr. GRAHAM.)

Q. Who was it that had the black head bending over the desk? A. Mr. August Roberti.

Q. Both Mr. Robertis have black heads, haven't they?

A. Yes, but Mr. August Roberti is shorter than I am and I always sort of looked down on his black head.

Q. Wasn't he sitting down at the time at the desk? A. Oh, no; he was standing.

Q. And this conversation took place in the office. What do you mean by “in the office”?

(Testimony of Miss Ella L. Green.)

A. In the part of their factory where the office work [188] was conducted.

Q. That is Mr. Roberti's office?

A. The office of Roberti & Brothers.

Q. Well, wasn't there more than one room there?

A. There was more than one room but there wasn't more than one office room at that time.

Q. Who occupied that office or that room?

A. During the working hours the office force.

Q. They were all in there together; is that correct? A. The office force was there together?

Q. Yes. A. Oh, yes; it was just a small force.

Q. Where were you at the time of this conversation? A. I was in the office.

Q. How far were you away from the desk when this was being talked about? A. Not far.

Q. Well, how far?

A. I couldn't tell you how many feet.

Q. Who else was in the room?

A. Mr. August Roberti, Mr. Daniel and Mrs. Minerva J. English.

Q. Was there any other worker in that room of the office force?

A. The office force consisted of myself and Mrs. English at that time.

[189] Q. How large a room was that?

A. I never measured it.

Q. Can't you give an idea how large it was?

A. A small room.

Q. What do you mean by "a small room"?



(Testimony of Miss Ella L. Green.)

A. Well, I should say it wasn't more than twelve or fifteen feet square.

Q. And had how many desks in there?

A. There were two.

Q. The drawing or blue-prints shown you by counsel, when did you see that last before you came into the courtroom?

A. I saw it about a week ago.

Q. Who showed it to you?     A. Mr. Brown.

Q. Mr. Brown?     A. Yes.

Q. You had a conversation with Mr. Brown at that time about the blue-prints?

A. He asked me if I had ever seen it.

Q. And what did you say?

A. I said I thought I had.

Q. You weren't sure about it, were you?

A. Well, I couldn't swear it was the identical copy, and I told him so.

Q. And you can't swear it now?

A. I could not.

[190] Q. Would you swear positively that those papers that Mr. Brown handed you are the papers that were shown to Mr. Roberti?

A. I could not swear that.

Mr. GRAHAM.—That is all.

#### Redirect Examination.

(By Mr. BROWN.)

Q. Miss Green, did you ever before this morning see the blue-print or copy there of Exhibit "T"?

A. Well, I couldn't swear I have seen this one.

Q. Is that the one that I showed you a week ago?

(Testimony of Edmund A. Strause.)

A. I have seen one similar. I have no way of identifying it as the exact copy.

Mr. BROWN.—That is all.

(Defendants rest.)

Mr. GRAHAM.—Mr. Strause, will you take the stand?

TESTIMONY OF EDMUND A. STRAUSE, FOR  
PLAINTIFFS (IN REBUTTAL).

[191] EDMUND A. STRAUSE, a witness called on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Mr. Strause, what is your business?

A. Patent attorney.

Q. How long have you been a patent attorney?

A. Quite a number of years.

Q. Were you a patent attorney in 1910?

A. Yes.

Q. And where were you located in 1913 and 1914 and 1915?

A. In the Wesley Roberts Building at the corner of 3rd and Main, Los Angeles.

Q. Do you remember a client by the name of William R. Daniel? A. Only by name.

Q. Do you have the files—or did he ever make an application for patent through you? A. He did.

Q. Have you the file of that application?

A. I have.

(Testimony of Edmund A. Strause.)

Q. Is there any correspondence in that file with Mr. [192] Daniel, either letters received from him or letters sent to him? A. Yes, sir.

Q. Will you please produce those letters, or copies of them?

A. Here are the letters I have in my hand.

Q. What is the first letter that you have there? What is it dated?

A. It is a letter dated September 13th, 1913, and addressed to Mr. William R. Daniel, care of H. W. Smith, 1338 East 15th Street, City, Los Angeles.

Q. Was the original of that letter sent to the address and properly mailed? A. I imagine so.

Q. Are you positive of it?

A. As far as I know.

Q. This letter reads: "Dear Sir:—"

Mr. BLAKESLEE.—Wait; we object unless the foundation is laid. There has been no testimony as to whether this witness knows by whom the letter was written or mailed or anything about it. We don't even know whether he is custodian of the file or where the file has been, or anything else about it.

Q. (By Mr. GRAHAM.) Where has this file been, Mr. Strause, since 1913?

A. It has been filed away in connection with other [193] matters that were prosecuted by the firm of Hazard & Strause.

Q. And has been in your possession all that time?

A. It has been in my possession since that time.

Q. I will ask you to look at that letter—

(Testimony of Edmund A. Strause.)

Mr. BLAKESLEE.—We further object that no foundation is laid. The witness hasn't testified that he had anything to do with this case personally. He was a member of a firm at the time, and may have had employees and it has not been connected up with any transaction concerning this case.

Q. (By the COURT.) Mr. Strause, did you handle the matter yourself?

A. I couldn't say, because I handled a large number of cases and naturally I wouldn't know unless I consulted the file as to whether I personally took the case in or not, but I remember the case very well.

Mr. BLAKESLEE.—May I ask the witness a question?

The COURT.—Yes.

Q. (By Mr. BLAKESLEE.) You had a partner at the time, didn't you? A. Yes, sir.

Q. And employees? A. Yes, sir.

Q. And you don't know whether you personally handled this case or these letters, do you?

[194] A. Well, I could see here in just a moment. Personally I didn't take the case. One of our employees did.

Q. You didn't prepare the application, did you?

A. That I couldn't remember.

Q. You don't know that you prosecuted it personally, do you? A. No; I did not.

Q. You have no knowledge of any of the contents of that file, personally, have you? A. Oh, yes.

Q. Excepting that it is a file of the then firm,

(Testimony of Edmund A. Strause.)

you have no knowledge of any transaction in there personally, have you?

A. No; I couldn't say that I absolutely have.

Mr. BLAKESLEE.—We object because no foundation has been laid. There must be some witness they could call who had knowledge of this transaction.

Q. (By Mr. GRAHAM.) I call your attention to a letter dated "San Francisco, California, Feb. 17-04," addressed to Hazard & Strause. Of your own knowledge was that letter received by your firm?

Mr. BLAKESLEE.—We object because no proper foundation has been laid.

A. It was.

The COURT.—He is presumably testifying to what he knows of his own knowledge.

[195] A. Yes.

The COURT.—He says he is.

Q. (By Mr. GRAHAM.) That letter is signed what? A. W. R. Daniel.

Q. And what does that letter state?

A. "San Francisco, California, Feb. 17-04. Hazard & Strause.

Dear Sirs:

Please inform me at your earliest convenience what action the Patent Office have taken in regards to my application for Patent Mattress.

W. R. DANIEL.

712 Shotwell St., San Francisco."

(Testimony of Edmund A. Strause.)

Q. Does your file show that any response was made to that letter?

A. It does; I personally responded to the letter.

Mr. BLAKESLEE.—The same objection to all of this.

The COURT.—Yes, and overruled.

Q. (By Mr. GRAHAM.) You personally wrote the response to that letter? A. I did.

Q. Have you a copy of this personal response that you made to that letter? A. I have.

Q. What is that dated?

[196] A. February 18, 1914, addressed to William R. Daniel, 712 Shotwell Street, San Francisco, California.

Q. I call your attention to these initials, "EAS" in the corner. What does that mean?

A. That represents my initials.

Q. And that letter reads in what manner?

A. "Dear Sir:—

Your favor of the 17th received. The Examiner in charge of your application has again rejected same on a newly discovered reference, and we will again amend same and endeavor to point out the differences. As soon as we hear anything definite, we will notify you.

Yours very truly."

Q. Did you receive any other letters from Mr. Daniel?

A. One other letter from San Francisco.

Q. What is the date of that letter?

A. May 3d, 1915.

(Testimony of Edmund A. Strause.)

Q. What is the signature to that letter?

A. W. R. Daniel.

Q. And what does that letter state?

A. "Dear Sirs:

As I have not heard from you in regards to my application for patent on mattress since September 12th, 1913, would be pleased to hear [197] from you in regard to same.

Respectfully."

Q. Is there any response in your files to that communication? A. Yes, sir.

Q. Will you please refer to that? Did you write the response personally? A. I did.

Q. And what does that state?

A. "May 5th, 1915.

Mr. W. R. Daniel,  
1277 Howard Street,  
San Francisco, Cal.

Dear Sir:

Your favor of May 3d received. The Examiner in charge of your application has repeatedly rejected the same on patents, domestic and foreign, which apparently clearly anticipate your invention. In his last action the Examiner stated:

'That the claims are rejected on the references of record in view of the modification shown in figure 4 of Busche.'

These references being herewith enclosed. As far as we can determine, the references apparently anticipate your invention, and on August 14th, 1914,

(Testimony of Edmund A. Strause.)

we wrote to Mr. H. W. Smith of 1338 East 15th [198] Street, to call relative to the same; all communications being directed to him at your request, yet Mr. Smith did not call, and thinking that you had lost interest in the matter, as well as Mr. Smith, the application became abandoned by reason of non-prosecution. If you still think that your device is patentable over the references of record, your only remedy will be to file a new application, which will cost you \$30.00.

Kindly let me hear from you relative to this matter at your earliest convenience, returning the references to me.

Yours very truly."

Q. Did you ever have any response to that letter?

A. No response and no return of the references.

Q. Were these letters sent in the ordinary course of business from your office?      A. Yes, sir.

Q. Were they sent through the mail, properly addressed?      A. They were, by clerks.

Q. And they weren't returned to your office?

A. No, sir.

Q. And these letters written to Mr. Daniel were dictated and written personally by you?

[199] A. They were.

Q. Is that correct?      A. That is true.

Mr. GRAHAM.—We offer these letters in evidence, embracing two letters from Mr. Daniel read by the witness, the letter of February 18th and the letter of August 14th, 1914, and a letter of May 15th, 1915, as one exhibit.



(Testimony of Edmund A. Strause.)

The CLERK.—Plaintiffs' Exhibit 6.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—We object to the offer on each of the grounds of the objection, excepting that those letters are copies of letters which the witness says he personally wrote, and further object on the ground that the correspondence has not been connected up with the particular application in question here, there being no showing that it pertains to the same application or subject matter.

Q. (By Mr. GRAHAM.) Did Mr. Daniel ever have another application in your office, Mr. Strause?

A. No, sir.

Q. And can you state from your records to what application these letters refer?

A. To an application on a mattress construction.

Q. Have you a print of that construction?

A. I have, yes, sir; I have a blue-print of the drawing.

[200] Q. Will you produce it?

(Witness produces same.)

Q. And this is a blue-print of the drawing of the application to which this correspondence which you have read relates?

A. Yes, sir. That is a correct copy of the drawing as filed in the Patent Office that accompanied the application.

Mr. GRAHAM.—We also offer in evidence this blue-print produced by the witness, as part of the previous exhibit. With respect to that portion of Mr. Blakeslee's objection referring to the letter not

(Testimony of William R. Daniel.)

being written by Mr. Strause, the letter not written by him is not placed with the exhibit.

The COURT.—The objection will be overruled unless there is a question as to Mr. Daniel's signature on the letters. I suppose technically they would have to prove that.

Mr. BROWN.—(After exhibiting letters to Mr. Daniel.) That is all right.

The COURT.—The objection will be overruled then.

Mr. GRAHAM.—That is all, Mr. Strause.

Mr. BLAKESLEE.—No questions.

Mr. BROWN.—Mr. Daniel, take the stand.

Mr. GRAHAM.—We have some other witnesses on rebuttal.

Mr. BLAKESLEE.—We would like to clear up this matter [201] first, if we may.

Mr. GRAHAM.—That is all right.

#### TESTIMONY OF WILLIAM R. DANIEL, FOR DEFENDANTS (RECALLED IN SURRE- BUTTAL).

[202] WILLIAM R. DANIEL, recalled by the defendants, in surrebuttal, testified as follows:

##### Direct Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, I call your attention to a letter addressed to you at San Francisco, California, dated May 5, 1915, being Plaintiffs' Exhibit 6, and will ask you if you recall receiving such a letter?

(Testimony of William R. Daniel.)

A. No, sir.

Q. Do you now recollect after reading that letter of having received it?

A. No, sir; I never got a letter like that.

Q. You never did?      A. I never did.

Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. After these letters, dated February 17—is that your signature to that letter?      A. Yes, sir.

Q. And this is your signature to the letter dated May 3d?      A. Yes, sir.

[203] Q. What was the last thing that you heard from Hazard & Strause?

A. Well, I can't tell you that; I don't know.

Q. You really can't say?

A. I can't say now but it was something about the patent being denied and that he would have to amend, the way he worded it. That is as near the substance as I can give you.

Q. Do you recall his sending you or you receiving copies of any other patents?      A. No.

Q. Printed copies like this?      A. No.

Q. Weren't they included with a letter that told you they would have to be amended?      A. No.

Q. You don't ever remember of seeing those?

A. No.

Q. But you received the letter?

A. No, sir; I did not receive that letter.

Q. Will you look at these carbon copies of these letters? Which of those did you receive?

(Testimony of William R. Daniel.)

A. That one sounds more like it. I couldn't swear that it was but that gives the substance of what I am trying to explain.

Mr. GRAHAM.—The witness referred to the letter of [204] February 18, 1914.

A. I didn't get anything that spoke of it in that way. It says: "Kindly let us know if you wish us to do anything further relative to the matter."

Mr. GRAHAM.—The witness is referring to the letter of August 14, from Hazard & Strause.

Q. That letter is addressed to Mr. Smith, is it?

A. To Mr. Smith, yes.

Q. And Mr. Smith was acting in your behalf in this connection, was he not? A. Yes, sir.

Q. And whether or not Mr. Smith sent that to you, you don't recall?

A. I don't recall, no, sir, but I don't think he did because I don't remember anything like that in any correspondence I have had.

Q. After that letter of May 3d, 1915, did you ever write to Hazard & Strause again?

A. I don't remember.

Q. You don't remember whether you made any inquiries about your application after that date?

A. No, sir, I do not.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, do you recall where you were in 1915, [205] in the early part?

(Testimony of William R. Daniel.)

A. I was in Napa, California.

Q. Napa? A. Yes, sir.

Q. Were you in San Francisco that year?

A. I was there in the fall. I think I came there in September.

Q. Were you there in May, 1915?

A. No. I think I left in April to go to Napa.

Q. Where did you reside when you were in San Francisco?

A. Well, at different places. I think it was on Ninth, between Mission and Howard.

Q. Referring to this letter addressed to you in San Francisco at 1277 Howard Street, did you ever reside at that address?

A. I believe that was the address.

Q. And were you at 1277 Howard Street, San Francisco, in May of 1915?

A. I don't think I was.

Q. You think you were in Napa, California, then, do you? A. I think I was in Napa, yes, sir.

Q. Did you keep your patent attorneys, Hazard & Strause advised as to your change of address?

A. Through Mr. Smith, yes.

Mr. BROWN.—That is all.

Mr. GRAHAM.—That is all.

[206] Mr. BROWN.—That is all.

Mr. GRAHAM.—Mr. Kaufman, will you take the stand, please?

TESTIMONY OF JACOB D. KAUFMAN, FOR  
PLAINTIFFS (IN REBUTTAL).

[207] JACOB D. KAUFMAN, a witness called on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

## Direct Examination.

(By Mr. GRAHAM.)

Q. What is your business, Mr. Kaufman, and where are you located?

A. Where am I located? Q. Yes.

A. At 5110 and 12 Moneta Avenue; furniture.

Q. General furniture business?

A. General furniture, stoves, rugs and so forth, and everything that goes with it; springs, mattresses, rugs and so forth.

Q. How long have you been in that business?

A. Somewheres in the neighborhood of about ten years; going on eleven years, I believe. I started in the year of 1913 in September.

Q. And where were you located when you first started in business? A. At 1023 South Broadway.

Q. How long were you there, if you remember?

A. I was there about four years.

Q. Did you ever have any dealings with Roberti Brothers [208] while you were located at that place on Broadway?

A. Yes; I bought my mattresses from Roberti. At that time I hadn't bought any from anyone else. I only handled his line.

(Testimony of Jacob D. Kaufman.)

Q. I show you a document, and I will ask you if you recognize this signature, "J. D. Kaufman"?

A. Yes; that is my signature.

Q. And I call your attention to a certain writing above your signature. Does that tell you anything? What does that mean to you?

A. It says: 1 35# Restmore, Roll Edge, Can't Stretch—C. S.

Q. Does that refer to some kind of furniture?

A. No; that is a mattress. That is a thirty-five pound mattress, a Restmore.

Q. You used the words "Can't Stretch." What is there on there that indicates that?

A. If I remember right at that time—I guess that was the first time that I had ever handled that mattress. They introduced that mattress.

Q. What mattress do you refer to?

A. They call it the "Sanotuf" now.

Q. Is that the same mattress—

A. It is the same mattress only, if I remember right, Mr. Ed. Roberti waited on me himself that time.

Q. How do you identify that as what you have called a [209] Can't Stretch mattress?

A. Well, that is the way they billed it, "C. S." You see, when I used to receive the ordinary mattresses it was just a felted mattress or a cotton mattress, as it was called.

Q. When did you place your signature on that document?

(Testimony of Jacob D. Kaufman.)

A. Well, it is supposed to be the date of the invoice, when it was delivered to me.

Q. The date that the mattress was delivered to you? A. That it was delivered to me.

Q. And this is an invoice for that mattress?

A. That is the invoice, yes.

Q. And what is the date appearing on that invoice? A. It is "10/29/14."

Q. And whose invoice is that? A. It is mine.

Q. And who was the mattress received from, or does it show on that invoice?

A. From Roberti Brothers.

Q. And that was a Can't Stretch mattress, so called at that time, which is the same as the "Sanotuf" now? A. The same as the "Sanotuf" now.

Q. Have you ever bought other mattresses from them?

A. Yes, sir. I bought the common mattresses, the cheap mattresses.

Q. The common tufted mattresses?

[210] A. Yes, sir.

Q. I call your attention to your name written apparently in blue pencil, and call your attention to either purple or black initials written over that. Can you explain what that is?

A. Well, it seems like the bill originally was made to D. L. Kaufman, that is, they delivered to him I guess by mistake, and the mattress was meant for me, and he probably had refused the mattress and then I changed the initials on there so that I would carry the invoice on my book at



(Testimony of Jacob D. Kaufman.)

that time and I put a "J" and put a "D" next to that. The "L" still shows on there.

Q. Is that in your handwriting, the "J. D"?

A. The "J. D." is in my handwriting. The rest is not.

Q. And did you receive that mattress at that time?

A. I must have or I wouldn't have signed for it.

Mr. GRAHAM.—We offer this in evidence as Plaintiffs' Exhibit No. 7.

Mr. BLAKESLEE.—We don't see wherein this is rebuttal in any respect, or its relevancy or materiality or competency.

The COURT.—It is a question of dates, I suppose.

Mr. GRAHAM.—It is a question of dates and invention, your Honor.

The COURT.—Objection overruled.

Mr. GRAHAM.—That is all.

[211] Mr. BLAKESLEE.—The further objection is made for the record that neither the paper nor the testimony of the witness disclose any construction or describe the construction of any mattress, so that it would be irrelevant for the purpose offered.

The COURT.—He said it was the same as the "Sanotuf" mattress now made.

Mr. BLAKESLEE.—That of course didn't go to construction interiorly at all.

The COURT.—Then we had better find out about that.

(Testimony of Jacob D. Kaufman.)

Mr. BLAKESLEE.—Yes.

The COURT.—I take it that it covers it unless it is shown by his examination to the contrary.

Cross-examination.

(By Mr. BROWN.)

Q. Mr. Kaufman, do you know anything concerning the interior construction of a “Sanotuf” mattress?

A. Well, I don’t know any more than the way I see it, that is, with the eyelets on top and the label. You usually show the customer what the label says regarding the construction of the mattress.

Q. Can you describe the construction of a “Sanotuf” mattress?

A. No, I cannot. The only thing I do is when I show the mattress I simply explain to them that it [212] has ventilation eyelets, and that the factory stands back of them with their guarantee.

Q. But as to its construction you know nothing of it? A. No, sir.

Mr. BLAKESLEE.—We repeat the objection as to the materiality and relevancy.

Q. (By the COURT.) Outside of the exterior and the eyelet and the appearance of it, is there any difference between the “Sanotuf” mattress displayed here and the one you say you bought under that invoice? A. About the same.

Q. But inside of it you have not looked?

A. I haven’t seen it.

(Testimony of Edward Roberti.)

The COURT.—I will allow it to remain as a circumstance. Of course it is not complete.

Mr. GRAHAM.—I expect to tie it up further, your Honor, by another witness. That is all.

Mr. BROWN.—If the Court please, I had certain depositions taken in the East regarding certain acts of unfair competition and violation of trademark, and according to Equity Rule No. 55 a deposition is deemed published when filed, and they are now on file. Will this court also deem that the depositions have been read?

The COURT.—If that is agreed.

Mr. GRAHAM.—We will waive any claim as regards the Restmore, your Honor. It may be filed, if you want to [213] put it in the record.

Mr. BLAKESLEE.—They are stipulated then to be offered and deemed read, and may be used for any purpose for which we may wish to use them?

Mr. GRAHAM.—That is satisfactory. Mr. Edward Roberti, take the stand.

TESTIMONY OF EDWARD ROBERTI, FOR  
PLAINTIFFS (RECALLED IN REBUT-  
TAL).

[214] EDWARD ROBERTI, one of the plaintiffs herein, called on behalf of the plaintiffs, having been previously duly sworn, testified as follows in *surrebuttal*:

(Testimony of Edward Roberti.)

Direct Examination.

(By Mr. GRAHAM.)

Q. I show you what purports to be an invoice. Would you please state fully what that is?

A. That is a duplicate invoice which we send with the driver that delivers our merchandise, to receive a signature for the receipt of merchandise.

Q. And that date "11/29/14," what does that refer to? A. "10/29/14" it is.

Q. Yes.

A. That is October 29, 1914.

Q. What has that date to do with the invoice?

A. That is the time of delivery of this merchandise.

Q. And in 1914 in your regular course of business were you making a duplicate invoice such as you have in your hand? A. Yes.

Q. Which was signed by the person to whom the goods were delivered? A. Yes, sir.

Q. Where did you obtain that particular invoice?  
[215] A. From our files.

Q. And it has been in your files all the time since 1914? A. Yes, sir.

Q. Will you refer to the description of the mattress on there and explain that to us?

A. One 35# Restmore Roll-Edge Can't Stretch 141 Tick, 4 foot and 5 inches, \$4.65.

Q. You said "Can't Stretch." Does it say "Can't Stretch" on that invoice?

A. No. That is an abbreviation the same as

(Testimony of Edward Roberti.)

“R. M.” is for Restmore and “RE” is for Roll-Edge.

Q. What is the abbreviation of that invoice for “Can’t Stretch”? A. “CS.”

Q. Do you know what the construction of that mattress was?

A. That was the same mattress as we are manufacturing now. I call it the “Sanotuf.”

Q. Was it the same exterior and interior construction? A. Yes, sir.

Q. That is, it had the eyelets? A. Yes, sir.

Q. And ties? A. Yes, sir.

Mr. BLAKESLEE.—We think the witness should describe it [216] without being led.

Mr. GRAHAM.—He has described the “Sanotuf” mattress.

Q. Will you describe the construction of that particular mattress, Mr. Roberti?

The COURT.—Let him make a general answer. First, was it the same as this construction of this mattress which you exhibited here?

A. It is the same construction as we are making to-day, called the “Sanotuf” mattress.

Q. In every particular?

A. In every particular.

Q. Especially as to its interior connections and construction? A. Yes.

The COURT.—I will permit cross-examination to determine any difference.

Q. (By Mr. GRAHAM.) Mr. Roberti, had you made any other mattresses at that time having the

(Testimony of Edward Roberti.)

same construction as what has been offered in evidence here as "Sanotuf" mattress?

A. Yes; we made several more of them. We made them all during that month.

Q. During what month?

A. The month of October, 1914.

Q. Subsequent to that sale of October 29th, 1914, did you sell any other mattresses of the same construction? [217] A. Yes.

Q. How do you fix those dates?

A. By records.

Q. Have you those records here?

A. I have some. Do you want me to read them?

Q. Yes. What are those records, in the first place?

A. These are similar records to those I read before here to J. D. Kaufman, only to different firms.

Q. They are invoices for mattresses delivered by you or your firm?

A. A duplicate invoice or receipt invoice, with the customer's signature.

Q. Will you simply refer to the dates of those and to whom they were delivered.

A. N. B. Blackstone, November 16, 1914.

Q. What was the mattress delivered at that time to N. B. Blackstone?

A. That was one 30# Restmore, Roll Edge, Can't Stretch, 178 tick, 4 foot by 6 foot.

Q. Was that mattress of the same construction as the "Sanotuf" mattress that has been testified to here? A. Yes, sir.

(Testimony of Edward Roberti.)

Q. Have you any others?

A. November 10, 1914, O. E. Putty, San Pedro, California, One 30# Floss Mattress, which is termed Kapot now, Roll-Edge, Can't Stretch, 4/5 x6/3.

[218] Q. Was that mattress delivered at the time indicated on your invoice?

A. Yes, only we have no signature on this because it was a shipment. We can't get a signature on a shipment. It was out of town.

Q. Was that mattress on the invoice you have just referred to of November 10th of the same construction as the "Sanotuf" mattress testified to here? A. The same construction, yes.

Q. Have you any others?

A. I have one here of November 5, 1914, to the South Pasadena Furniture Company, South Pasadena, and here is a numerous lot of other merchandise on the same bill. There is one 30# Restmore blue—well, that isn't it either. It says, "Two 30# Floss Roll-Edge Can't Stretch, \$9.75 each."

Q. Is that the only article on there referring to the Can't Stretch mattress?

A. That is the only article on there referring to the Can't Stretch mattress.

Q. According to your records were those two mattresses mentioned on that invoice delivered at the time indicated thereon? A. Yes.

Q. Was the construction of those two mattresses the same as that which has been described as the "Sanotuf" [219] Mattress? A. Yes.

(Testimony of Edward Roberti.)

Q. Have you any other records?

A. That is all the invoices I have here.

Q. Were these invoices which you have just referred to kept in the regular course of business by the firm of Roberti Brothers?     A. Yes, sir.

Mr. GRAHAM.—We offer in evidence these invoices.

Q. Where did you obtain these invoices?

A. From our files.

Q. And where have they been since they were made out in 1914?     A. In our office.

Q. And they are such invoices as are kept in the regular course of business by your concern?

A. Yes, sir.

Q. And each of the mattresses referred to on these invoices as a Can't Stretch mattress, was that of the same construction as the "Sanotuf" mattress which we have in court and which is marked Plaintiffs' Exhibit 4?     A. The same.

Mr. BLAKESLEE.—In this connection I would like to lay a foundation in connection with the offer and ask the witness if he had anything to do with the sale of these particular mattresses on these invoices.

[220] Q. Did you sell them personally?

A. I personally sold all of those.

The CLERK.—(Referring to the last exhibit offered.) Plaintiffs' Exhibit 8.

Q. (By Mr. GRAHAM.) Mr. Roberti, you testified, if I understood you correctly, that you had made some mattresses prior to the date on the first



(Testimony of Edward Roberti.)

one of these invoices, that is, October 29th, 1914.

Is that correct? A. We made several of them.

Q. In other words, this first mattress which you sold was not the first mattress which you made?

A. No.

Q. Do you recollect when you first made a mattress which embodied all of the construction, that is, that was of the same construction as shown in Plaintiffs' Exhibit 4?

A. The first mattress that we made, a full-sized mattress, in anticipation of putting it on the market, that is, ready to use, was about the first week in October, 1914.

Q. That is the same month that this one was sold, is that correct?

A. The same month that this was sold.

Q. And prior to that time had anything been done toward making a mattress which was different from the ordinary tufted mattress?

[221] A. Yes; we worked on the mattress in a model form, making small models I would say 60 days before that time.

Q. When did you first get the complete idea of the mattress in its present form, or as shown in your patent?

A. I would say about the first week in October, 1914.

Q. Where did you first get your idea of making a mattress along this order, Mr. Roberti?

A. Why, when we first went in business, my brother and I, we did repair work, that is, reno-

(Testimony of Edward Roberti.)

vating mattresses, and we remembered of making over some mattresses which were brought here from Russia, filled with sheep's wool. The construction of the tick was different than ours but it had inside ties which were used in what they call a home method of making a mattress. They would just fill the mattress by hand a certain distance and then take the ties and tie them together to bring the mattress down to a uniform thickness. Then they would put some more filling in and take and tie those strings together at another interval and continue on until they got the mattress completely filled. I know when we made this mattress over for these people we asked them if they wanted them made the same way they were, or to use our method of tufting them on top, that is, our regular form of making mattresses, and we got their idea and in talking it over together we wondered why we couldn't conceive some idea of tying a mattress inside [222] and that is when we arrived at the idea of using the eyelet in the mattress.

Q. That idea of using the eyelet didn't come to you right away, did it?

A. Oh, no. When we were making mattresses at first like that we were just you might say in the retail work and we hadn't any idea of ever patenting a mattress at that time, but having that experience with these mattresses it learned us the idea of improving a mattress, or inventing a mattress.

Q. Reverting for a moment to the mattresses re-

(Testimony of Edward Roberti.)

ferred to in those invoices, do you know where any of those mattresses are at the present time?

A. No; I couldn't say.

Q. Mr. Roberti, how were the first "Sanotuf" mattresses made, that is, the mattresses which embodied the complete construction as shown by Plaintiffs' Exhibit 4?

A. They were made just the way they are made now.

Q. Well, were they made by hand or by machinery?

A. Our first models that we made and the first mattress that we made for several months were made with—or the eyelets were put in by hand.

Q. What do you mean by they "were put in by hand"?

A. Well, just the same as you would put a gromet in with a pair of tweezers like in a tent.

Q. Are you still putting them in with this hand punch, [223] or whatever you call it?

A. No. We have automatic eyelet machines now.

Q. When did you first have the automatic eyelet machines?

A. I have an invoice here from the United Shoe Machine Company on February 13, 1915.

Q. That date you have referred to, what connection has that with the power machine which you spoke of?

A. It says here: 1 Cameo foot power eyelet machine No. 331, race-way 16389.

(Testimony of Edward Roberti.)

Q. Did you receive that machine referred to and the document— A. We still have the machine.

Q. Prior to the receipt of that machine what had you done in the way of getting a machine of this kind?

A. We had communicated with everybody we could get in touch with in regard to some sort of an eyelet machine and I have a letter here of December 24, 1914, where we applied for a machine.

Q. Who did you make that application to?

A. To the United Shoe Machine Company, San Francisco, to their agents at San Francisco.

Q. Prior to the date of that letter in December, 1914, had you made any effort to get a power machine?

A. We were looking wherever we could. We had gone to several of the shoe finding companies on Los Angeles [224] Street to try to find out if there was any way of getting hold of an eyelet machine, and there didn't seem to be anybody in this city at that time that was using eyelet machines, so we thought they might give us an idea where to get them on account of being in touch with the shoe people, and we asked everyone that we came in contact with that we thought might give us some enlightenment on where to get such a machine.

Q. Did you continue making mattresses from the dates of those invoices in November, 1914, to the present time? A. Yes, sir.

(Testimony of Edward Roberti.)

Q. And you have made them in large quantities?

A. Yes, sir.

Q. Is there any other way that you can fix the date relating to when eyelets were first used in quantity by you for the so-called "Sanotuf" mattress?

A. Yes. I have an invoice here from Dolliver & Brothers, manufacturers of eyelets, with an agency in San Francisco.

Q. What is the date of that?

A. Well, I beg your pardon; it is not an invoice. It is a letter from them giving us a price on eyelets.

Q. In what quantities?      A. In quantities.

Q. In what quantities, I say?

A. This says "We enclose sample card of Derby eyelets to prevent any mistake in color, No. 700 in blue."

[225] Q. Does that refer to the price on quantity, and if so, what quantities? Does that give a price?

A. It says 10,000 Derby Eyelets No. 700.

Q. Prior to that time how were you buying your eyelets? Or what is the date of that document you referred to?

A. This is dated January 21, 1915.

Q. Prior to that time how were you buying your eyelets?

A. We were buying them from the Los Angeles Saddle and Finding Company, I think is the name of the concern, on Los Angeles Street.

(Testimony of Edward Roberti.)

Q. Were you ever in the office of the Imperial Cotton Works? A. I have been.

Q. Do you recall where the Imperial Cotton Works was located at the time that you were there?

A. I think it was Fifteenth and Hooper Avenue.

Q. Do you remember the occasion of your visit or visits to the Imperial Cotton Works?

A. I don't recollect of ever being in their place but twice while they were there in business on Hooper Avenue.

Q. What was the purpose of your visits that you have just referred to?

A. It was for the purpose of purchasing some ticking.

Q. From the Imperial Cotton Works?

A. Yes.

[226] Q. Were you approached by any one to purchase this ticking?

A. I can't recall now whether it was a customer had picked out a sample of their ticking for us to make a mattress of their ticking or that they wanted to dispose of some ticking, but I know I was over there to see some ticking once.

Q. While you were there were you ever shown any mattresses? A. Not that I ever recall.

Q. Did Mr. Fox ever show you any mattresses?

A. Not that I ever recall.

Q. Have you ever seen a quilt or comforter that was made by the Imperial Cotton Works or Mr. Fox?

A. I saw some of Mr. Fox's—or the Imperial

(Testimony of Edward Roberti.)

Cotton Works' comforters in stores, but I don't remember of ever seeing one in their place.

Q. Do you recall Mr. Fox or anyone there showing you a mattress? A. No.

Q. You were here in the courtroom and heard the testimony of Mr. J. H. Jonas, did you not?

A. Yes, sir.

Q. And do you recall Mr. Jonas testified to seeing some models or samples of one of your mattresses in San Francisco in 1916?

[227] A. Yes, sir.

Q. Is that correct? A. Yes.

Q. Could you state of your own knowledge what the construction of those models or samples was, and what was the purpose of having models or samples up in San Francisco?

A. Mr. New of the New Company, or I think it was the New Company then—anyway Mr. New of a ticking house in Chicago—called on us to sell ticking and I was showing him our invention and he thought very well of it, and he says, "If you will give me a model to take along I will see if I can do you some good up North," and I gave him a small model to take up with him which was made identically with eyelets and tabs as we are making it today.

Q. Did, to your knowledge, any one else on your behalf have a model of that kind in San Francisco, or a model of any other kind of a mattress, made by you? A. No.

Q. Mr. Roberti, have you ever had any trouble or

(Testimony of Edward Roberti.)

heard of any complaints about your mattress becoming torn or untied?

A. We have had some complaints about the knots coming untied, which fasten the upper and lower tab on the inside of the mattress, due to the carelessness of the mattress-maker in not tying the knot properly, which we [228] have gradually overcome; but we never have had any other part of our mattress come apart.

Q. Have you had any trouble with the tabs tearing off? A. We never have.

Q. I call your attention to a large mattress, a full-sized mattress, lying there on the chairs. Is that one of your "Sanotuf" mattresses?

A. That is one of our regular mattresses, a "Sanotuf."

Q. Is that made exactly in accordance with the patent in suit? A. It is.

Q. Mr. Roberti, will you look at that mattress and describe to us the making of that mattress as regards the material used and the question of stretching of material after the mattress is finally made, and compare that with this mattress of defendants, marked Plaintiffs' Exhibit 3.

Mr. BLAKESLEE.—We can't see the object, your Honor, in going all over this again. There has been one of plaintiffs' mattresses compared with the defendants' mattresses. Now, they bring in another and I can't see where it is anything but an incumbrance to the record. It isn't said to be any different from Exhibit 4.



(Testimony of Edward Roberti.)

Mr. GRAHAM.—There has been evidence by defendants' witnesses regarding certain alleged defects in the [229] plaintiffs' mattresses. They have made comparisons of the two mattresses. This new mattress is simply referred to as being of such a size as will compare more directly with the mattress Plaintiffs' Exhibit 3 which has been offered in evidence. That is the only purpose.

The COURT.—He can make the comparison of the points resulting from the construction as between the two. I think that was done by Mr. Jonas.

Q. (By Mr. GRAHAM.) Proceed, Mr. Roberti.

A. This mattress, as I have stated before, is made from an upper and lower tick member and has a never-stretch strip sewed crosswise of the mattress and also fastening a tab at intervals under each eyelet on upper and lower member of the tick, and which eyelet receives the needle to tie upper and lower tabs together to get the uniform thickness of mattress. In putting our eyelets at different distances from this seam it enables us to make a mattress with different thicknesses. A thin mattress that is real thin we put our eyelet closer to the seam so that we don't take as long a bite on our tab, which enables us to draw the mattress closer together, that is, the two sides of the ticking closer together. For illustration, if we made a mattress 12 inches thick we would have to put this tab, or eyelet rather, two or three inches from that seam in order to gain the result, so that the mattress

(Testimony of Edward Roberti.)

would not be [230] sunken into the tab where it is tied down.

The COURT.—I understand that now.

A. We allow our mattress one inch of take-up in the width of a mattress, which we claim can never all come out, because we have eliminated the stretching of the ticking, as the biggest part of the stretch of a mattress is the result of the stretching of the ticking; and the tying of our mattress is so shallow that we do not take up any great amount of ticking in tufting our mattress down, only to the extent of this one inch. Now, in regard to the "Tiednotuff" mattress, I can't see any difference in the operation or construction to bring the same results. They have the upper and lower tick members the same as we have; they have the tabs on the sides. Instead of being sewed on one side of the eyelet they have it sewed to both sides of the eyelets. And they have the never-stretch strip going across the same as we have on the "Sanotuf" mattress; and they have got to tie this mattress down with a needle through the eyelet with the same operation that we do on the "Sanotuf" mattress. As far as the take-up in the mattress, or as far as spreading rather, I would say that our mattress would not spread as much as this mattress for the reason that their never-stretch strip going across is broken at intervals, in seven different places, which will allow the ticking to stretch in [231] those places, where ours will not.

(Testimony of Edward Roberti.)

Q. (By Mr. GRAHAM.) I call your attention to the tabs on the defendants' mattress, and will ask you whether or not a tab that is connected by a single row of stitching, and where the pull is on the row of stitching, such as shown in the defendants' mattress, is not more liable to tear off than the tab of plaintiffs' mattress in which the pull is against a whole row of stitching?

A. From a mechanical standpoint I would say that a tab sewed on, and the strain which comes on that tab that is pulled from the center of that tab and not from the edges, would hold a greater strain than anything sewed where you pull against the end of the stitching, and it is easier to tear something from the end than it is in the center where you haven't got a broken thread to start.

Mr. GRAHAM.—We offer this mattress referred to by the witness in evidence as Plaintiffs' Exhibit 9.

The COURT.—It may be considered in evidence. Any cross-examination, gentlemen?

Mr. BLAKESLEE.—Yes, your Honor.

[232] Cross-examination.

(By Mr. BLAKESLEE.)

Q. With regard to any visit to the Imperial Cotton Works and any conversation with Mr. Fox, are we to understand that Mr. Fox never did show you a mattress, or that you don't recollect seeing such a mattress?

A. To my recollection I never saw a mattress in his place outside of I might have gone into his

(Testimony of Edward Roberti.)

factory and might have seen some mattresses laying around, but my attention was never called to any particular mattress.

Q. And you feel so sure of that that you would say it was not called to your attention?

A. I would absolutely swear I didn't see any particular mattress of any particular construction in the Fox establishment.

Q. Prior to 1914 you had seen a mattress with eyelets in the tick, had you not? A. No.

Q. No such mattress? A. No.

Q. Had you ever seen a patent showing such a mattress with an eyelet? A. No.

Q. You had never seen a patent of a man named Avrill with an eyelet in the tick? A. No.

[233] Q. Did you consider that you or your brother, or both of you, were the first to put an eyelet in the tick of a mattress? A. No.

Q. Where did you get that idea?

A. I have seen eyelets for the purpose of ventilating the side of a mattress a good many years ago.

Q. Do you consider that the presence of an eyelet in the tick of a mattress will ventilate the mattress, that is, a number of them?

A. I do if the ticking is of a sufficient weight to hold more air than the lighter tick.

Q. The mattress has to be put under pressure, though, I suppose, and no ventilation takes place in the mattress without any pressure on it, does it?

A. Yes, it does.

Q. In your affidavit with your brother, being

(Testimony of Edward Roberti.)

your preliminary statement in the interference with Mr. Avrill, the affidavit dated the 8th of February, 1917, being part of Exhibit "E," you didn't refer to any model. Do you remember why you neglected to refer to that or mention it?

A. We mentioned the first mattress we made.

Q. You didn't mention any model in that affidavit? A. No.

Q. Did you tell your attorneys that you had made a [234] model? Did you tell them at that time?

A. No; I don't know as I did.

Q. What became of that model? .

A. I don't know.

Mr. GRAHAM.—That is objected to as assuming a fact that is not shown in the record. I don't recall the witness testifying to having made any models. He simply said he worked on mattresses, but as to a particular definite model I don't recall any testimony.

Mr. BLAKESLEE.—Oh, yes; the record says so.

Mr. GRAHAM.—Oh, is that so?

The COURT.—It is now 12 o'clock, Gentlemen. We will take a recess until to-morrow morning at 10 o'clock.

(Whereupon an adjournment was had until 10 o'clock A. M., Thursday, February 7, 1924.)

(Testimony of Edward L. Roberti.)

[235] Los Angeles, California, Thursday, February 7, 1924, 10 A. M.

The COURT.—You may proceed, Gentlemen.

EDWARD L. ROBERTI, recalled.

Cross-examination (Resumed).

(By Mr. BLAKESLEE.)

Q. What was it, Mr. Roberti, that suggested to you the use of eyelets in a mattress?

A. For a permanent opening to connect the inside ties.

Q. Did anything that you knew of suggest that to you—any other use of eyelets?

A. Where we got the suggestion of eyelets was because they are commonly used in shoes and so on, and it naturally would come to a person's view and reason to use them.

Q. The eyelets in shoes often are devoid of any metal lining or eyelet device, are they not?

A. No; the first eyelets that were used were shoe eyelets.

Q. I mean often shoe eyelets have no metal in them at all but are just perforations in the leather; isn't that correct? A. Yes, they are.

[236] Q. They are called eyelets, are they not?

A. I don't know as they are.

Q. They serve just as effectively, don't they?

A. I guess they do.

Q. You would not anticipate any trouble, would you, in using mattress ticks with perforations in

(Testimony of Robert L. Roberti.)

them such as shown in the Daniel drawing even if there were no metal linings for the openings?

A. Yes.

Q. You could use them, could you not, without the metal linings? A. No.

Q. Why not?

A. Because the hole would close up.

Q. Well, it wouldn't require any particular magic to get the needle through at that point, would it, where the hole had been opened?

A. You would tear the cloth and leave a torn place in the mattress.

Q. After the cord has been passed through the eyelet isn't used any further, is it; it has no further utility? A. Yes.

Q. What is that?

A. So that the mattress could be renovated and made over in the same form in which it was originally [237] made.

Q. And do you think it would be injurious to the mattress to reopen that hole for the purpose of renovating after the mattress had been used for a while?

A. No one in making a mattress over would know how the mattress was made. Nothing on the outside would show how they tufted the mattress down.

Q. Not even if there had been a clearly defined opening formed there first?

A. I say, that hole would close up.

Q. Well, suppose an opening had been formed

(Testimony of Robert L. Roberti.)

by cutting out a part of the fabric; would it not stay there?

A. Then it would ravel out and become a tear in the mattress.

Q. Then you consider the eyelet is valuable as a metal device for preserving that opening?

A. And for ventilation also.

Q. Just the same as it has been of use in any textile or leather for keeping the formation of the hole? A. Yes.

Q. Then I understand you to say the eyelet is valuable for ventilation of the mattress?

A. Yes.

[238] Q. You do not have ventilation in your present mattress, do you? A. No.

Q. Exhibit 9 shows the openings closed by the fabric underneath, does it not? A. No.

Q. Why have you abandoned the ventilation of it?

A. I said no.

Q. Isn't there fabric under those eyelets?

A. No.

Q. What is it that closes the eyelet?

A. They are not closed.

Q. Well, there certainly is material under the eyelets?

A. That is the filling in the mattress.

Q. And that comes right up to the opening, does it? A. Yes.

Q. How far do you anticipate ventilation would proceed within the mattress with the filling coming up right to the opening of the eyelet?



(Testimony of Robert L. Roberti.)

A. It would penetrate the same distance that the heat from the body would go into the mattress.

Q. You think air would penetrate the same distance that heat would? A. I do.

[239] You have never made any tests of that, have you? A. Only from common sense.

Q. You think the air would penetrate the mattress filling, even if the filling same right up to the opening, do you? A. I do.

Q. Now was this eyelet suggestion yours or that of your brother?

A. We talked over the eyelet together and my brother made the suggestion of using a shoe eyelet.

Q. I suppose that suggestion was made after the suggestion of using the tabs and anchoring means for the tabs, was it not? A. Yes.

Q. Who made that suggestion? A. I did.

Q. You suggested the tabs and the anchoring means and your brother suggested the eyelets?

A. No, my brother suggested using shoe eyelets.

Q. Yes, I say, using an eyelet. Now when was it that these suggestions were merged together so as to produce this mattress? When did that occur? When were these suggestions made?

A. Well, some time off and on all during the [240] first part of 1914 and up until we invented the mattress.

Q. Now you say when you invented the mattress. When did you consider that invention was complete?

A. Do you mean when the patent was issued?

(Testimony of Robert L. Roberti.)

Q. No, but when, to your idea, you had, with your brother, finished the invention so that it was an accomplished fact in your minds. In other words, when the idea had been worked out to consummation.

A. About the first week in October, 1914.

Q. Do you remember where these discussions with your brother took place?

A. They took place in the office and also in the workroom.

Q. What, if anything further, did you suggest toward this idea?

A. Well, neither one of us ever worked anything out alone; we always consulted one another, whatever we were doing, for the benefit of the business.

Q. Do you remember distinctly anything else that you contributed to this combination?

A. I feel as though I contributed as much as he did.

Q. Can you name any other features that you contributed?

A. I considered it a joint invention on account [241] of us both getting it up.

Q. Well, of course that is a question of fact to be determined; but what I am trying to get at is what it was that you did or contributed toward this joint invention. Have you in mind anything further that you suggested?

A. I couldn't recall just the words that I suggested now, because we would, you might say, argue this thing back and forth at any suggestion either

(Testimony of Robert L. Roberti.)

one of us made from the sales standpoint and the feasibility of manufacturing.

Q. Who suggested the use of the strips running across the inner surfaces of the tick members and secured to the tick members?

A. That I don't know, which one of us did.

Q. You don't remember?

A. All I can remember is that our object was also to get a never-stretch mattress, and that was the feasible way of obtaining that result.

Q. Who was it suggested the passing of the twine through one tick at its eyelet and through the tab and down through the other tab and out through the other eyelet and back again and knotting the twine to draw the tabs toward each other?

A. I don't recall. That is a natural condition of mattress making that has to be done in order [242] to complete the mattress.

Q. Well, you considered that was a new operation with you and your brother, did you not?

A. On the outside it is.

Q. You considered that was a new method of assembling a mattress, did you not?

A. Yes. That is the way we were doing it.

Q. Who first made the suggestion of this method of procedure?

A. I can't remember that now.

Q. You consider that really as the backbone of the invention, don't you?     A. Yes.

Q. That method. And you don't remember who suggested it?

(Testimony of Robert L. Roberti.)

A. I don't remember who first suggested it.

Q. Now you say all of these suggestions and this cross-fire of conference on this matter took place at your office or in your workrooms? A. No.

Q. At what other places did you discuss this matter?

A. I worked on it at home, and so did my brother.

Q. Did you consult anybody else in these matters?

A. Not while we were first experimenting.

[243] Q. Did you consult Mr. Scanlon?

A. After we had it up to the point where we have it to-day.

Q. During the working out of this invention did you or your brother make any sketches of the parts and features as you developed them?

A. Did we personally make any sketches?

Q. Yes. A. I don't remember that I ever did.

Q. Do you know of any that your brother made?

A. No. I don't know.

Q. During this period of some months while you developed this idea, to your recollection no record was made of the various suggested steps by producing sketches of the same?

A. We would probably make a drawing in our argument of the different ways of making it—make our drawings while we were sitting at a desk, of the contemplated method of making it, but we never made any original blue-prints or drawings ourselves.

Q. Do you remember making any such fragmentary sketches?

(Testimony of Robert L. Roberti.)

A. A good many times, yes. That would be our only procedure of showing one another just how it was to be done.

Q. Well, you do remember making them?

[244] A. Yes.

Q. Did you make them and your brother also?

A. Yes.

Q. Do you know what became of them?

A. No.

Q. Have you made any attempt to find them?

A. No; they would probably be thrown in the waste basket.

Q. You don't recollect what became of them?

A. No.

Q. You made no complete drawing of the device before you made the first mattress? A. No.

Q. During the year 1914 you made various kinds of mattresses which were called "Restamore," did you not?

A. No, not various kinds that were called "Restmore." That was the name of a filling which we used in a mattress.

Q. You made a number of kinds of mattresses that you sold during that year? A. Yes.

Q. Are you quite positive that the mattresses referred to in these order copies in evidence here which you identified yesterday were mattresses like Exhibit 9 here? [245] A. I am.

Q. You have no memorandum other than those mere items on those bill copies to show what those mattresses were, have you? A. No, I have not.

(Testimony of Robert L. Roberti.)

Q. Those bill copies simply refresh your recollection, do they, that you sold certain mattresses to the customers indicated on those copies?

A. We naturally would go to our files to see if we couldn't get some concrete evidence of delivery.

Q. You didn't make out those bills yourself, did you, of which you have produced copies?

A. No; that is not my handwriting.

Q. There is nothing about those bills that gives you any clue as to the nature of the mattresses themselves, is there?      A. Yes.

Q. What is that that appears on the bills that gives you such a clue?

A. The abbreviation on there of the character of the merchandise.

Q. In other words, simply the "CS" indication?

A. Yes.

Q. And that is the only thing that indicates to you the type of mattress?      A. Yes.

[246] Q. Did you make any other mattress during 1914 that could be considered a can't-stretch mattress?      A. No.

Q. Nothing that you sold as a can't-stretch mattress?

A. No. We never put anything else on the mattress. We worked on several other mattresses in regard to getting a never-stretch mattress up, before we got this idea, but we never put anything on the market.

Q. Now you had a fire at your place of business in the latter part of 1914, did you not?

(Testimony of Robert L. Roberti.)

A. I couldn't just recall. I think somewhere along there we had a fire, yes.

Q. And that necessitated your getting the assistance of us manufacturers to some extent, did it not? A. No.

Q. You didn't go to the Imperial Cotton Works for certain work or certain material after that fire?

A. I may have gone to buy some material, but no assistance.

Q. Well, I mean to help you out in the emergency after the fire.

A. I don't recall. I might have gone there to buy some material.

[247] Q. Didn't they do some work for you over there? A. I don't recall if they did.

Q. Well, you went there quite a number of times in connection with material or labor for your mattresses, didn't you, in 1914 and the first of 1915?

A. I don't recall going there for any assistance or—I might have gone there to buy some material, but I don't remember of going there any number of times.

Q. How many times would you say you went there?

A. I don't remember of ever being inside of the Imperial Cotton Works more than twice.

Q. What part of the Imperial Cotton Works place of business did you visit?

A. I was into the office, and I remember once of looking at his—going over his stock of ticking.

Q. Out in the shop?

(Testimony of Robert L. Roberti.)

A. No, it was not out in the shop.

Q. In a showroom?

A. No, it was out on the floor. I wouldn't consider it a showroom.

Q. Didn't you go into the showroom during those visits at that time?

A. I don't remember ever being in a showroom, and I don't remember of their ever having a showroom.

Q. Where was the plant located when you went [248] over there?

A. I think it is either Fifteenth or Sixteenth and Hooper Avenue. Just a few blocks from my place.

Q. Did the first mattresses that you put out have strips clear across the ticking—cross-strips?

A. The first mattresses we sold?

Q. Yes.      A. Yes.

Q. And it had the tabs also?      A. Yes.

Q. Do you use the tabs applied in the same way now?      A. Yes.

Q. And the cross-strips?      A. Yes.

Q. What changes have you made from the first mattresses of this kind?

A. In regulating the eyelet a certain distance from the seam that fastens the tab to the upper and lower members of the tick.

Q. Do you consider that it is necessary to place the eyelet at one side of the center of the cross-strip?      A. I don't get that.



(Testimony of Robert L. Roberti.)

Q. Your patent shows the eyelets at the center of the cross-strips. Do you consider that a necessary [249] location of the eyelets?

A. Well, we have to place the eyelet a certain distance from the seam in order to regulate the depth in which we tuft our mattress.

Q. Suppose you put the eyelet squarely over the center of the cross-strip, would that be satisfactory? I hand you a copy of the patent (handing document to witness). A. You mean—

Q. Right in the longitudinal center of the cross-strip.

A. You mean this cross-strip here (indicating)?

Q. Yes.

A. No, it wouldn't make any difference to us if it was at the edge of that cross-strip or in the center.

Q. You consider there would be no benefit to be derived, as far as your invention might give such benefit, by locating the eyelet out of the longitudinal center of the cross-strip?

A. I don't see what difference it would make.

Q. Now if you put the eyelet directly over the seam it would not do, would it? A. No.

Q. You have referred to your novel method, as you consider it, of assembling the mattresses from the [250] outside. The assembling of a mattress by cording the parts together was, in itself, old, of course, was it not?

Mr. GRAHAM.—That is objected to as not calling for a specific construction, and also as calling

(Testimony of Robert L. Roberti.)

for a conclusion of the witness as to whether it was old or not.

The COURT.—If you are agreed as to what is meant by “cording” the witness may answer. Do you understand, Mr. Witness?

A. I don’t understand what he means by cording.

Q. (By Mr. BLAKESLEE.) I mean the tying together of the mattress.

A. What we commonly term as tufting the mattress down?

Q. Yes, passing the tie or cord clear through the mattress. A. May I hear that question again?

Q. I will restate it: That procedure was old, was it not, in mattress building?

A. Yes, before my time.

Q. And it was old, was it not, to do that without using any outside tufts at all?

A. Not that I ever saw. We always used a tuft of some kind.

Q. Didn’t it simply fasten to the tick without a [251] tuft?

A. I don’t remember of anybody making a mattress that way.

Q. Didn’t you refer in your direct examination to a Russian mattress that was tied together?

A. From the inside.

Q. How was that tied?

A. With a bow knot, so that it could be untied again.

Q. And there were two reaches or lengths of cord, were there not?

(Testimony of Robert L. Roberti.)

A. Yes; there was a cord fastened to the upper member and lower member, probably seven or eight inches long, each one; a string.

Q. (By the COURT.) Tied by hand from the inside?

A. Tied by hand from the inside.

Q. (By Mr. BLAKESLEE.) It was looped through the tick at the top and bottom?

A. No, it was not exposed at the top of the tick at all, or the bottom, either side.

Q. It was not sewed to the tick?

A. It was sewed to the tick with thread, but never appeared on the outside of the tick.

Q. And no tab was used? A. No.

Q. It simply drew the ticks toward each other?

[252] A. Yes, sir.

Q. Were those mattresses reinforced in any way where the twine was attached to the tick?

A. No.

Q. Is it not true that the upper eyelets in your mattresses of the never-stretch or "Sanotuf" type do pull out the tick at times?

A. What do you mean by the upper eyelets?

Q. Well, in the upper tick, on top of the mattress.

A. There is no difference between one side and the other of the mattress.

Q. Well, of course one side is made the top of the mattress on the bed.

A. No, there is no such thing as the top of the mattress.

(Testimony of Robert L. Roberti.)

Q. It is the top of the mattress when one side is placed on the springs of a bed.

A. It is reversible.

The COURT.—I understand it is reversible.

Q. (By Mr. BLAKESLEE.) Yes, but is it not true that one side of the mattress in use has the eyelets pull out at times?

A. We have had some trouble with an eyelet machine, sometimes, not being set right in order to crush this eyelet properly on a thin material, and [253] sometimes it didn't clinch perfectly and then the eyelet wouldn't hold good, which was on account of faulty workmanship, but when the thing is functioning right we never have any trouble.

Q. (By the COURT.) Is there any greater strain on that surface of the mattress which is the top than on the surface that is underneath, resting on whatever you have there?

A. You mean on the eyelets?

Q. Yes.

A. There is no strain on the eyelet whatsoever. That eyelet has no strain whatsoever on it.

Q. (By Mr. BLAKESLEE.) By the upper side of the mattress I meant the side that a body lies on on the bed. Is it not that side that the eyelets pull out of? A. No.

Q. Any more than the other side? A. No.

Q. Can you remember when it was that this method of assembling or tying together the mattress parts became developed in your mind or your

(Testimony of Robert L. Roberti.)

brother's as a complete performance or a complete method of assembling the mattress?

Mr. GRAHAM.—We object to that. I think the witness has testified to it.

[254] A. I think I answered that question.

Mr. BLAKESLEE.—No; he stated that he didn't know who suggested it, and I am asking him when that method came to completion in somebody's mind.

A. About the first week in October, 1914.

Q. That is when that method itself was first completed in somebody's mind? A. Yes.

Q. Do you know where that complete idea was first expressed by either you or your brother? Was it in the shop or in the office?

A. I couldn't say.

Q. Was anybody present when that was first discussed? A. No, I don't think so.

Q. In fact you have no definite recollection whether it was you or your brother that first suggested that method as a complete method, have you?

A. There are several methods in the manufacture; I don't know which one you refer to.

Q. The method of assembling by passing the twine down through one eyelet, through the tab, and through the other tab and eyelet, and back again and tying it with a slip-knot and concealing the knot inside.

A. This was not done in one or two days; it took several weeks to figure this out, and it is [255]

(Testimony of Robert L. Roberti.)

pretty hard to say just where we were at each particular time we talked this over.

Q. Well, you don't remember who it was made the final suggestion that completed that as a method of mattress making, do you? A. No.

Q. Now you say you always used the cross-strips under the tabs?

A. We may have experimented after we got our mattress up—we may have experimented in several ways to eliminate cost in production, and experimented to do it several ways, but we never put the mattress on the market only as it is made to-day.

Mr. BLAKESLEE.—That is all.

#### Redirect Examination.

(By Mr. GRAHAM.)

Q. Mr. Roberti, would the thickness of the mattress have anything to do with placing the eyelet or with respect to the place the eyelet is put with relation to this strip that runs across the mattress?

A. Do you mean the distance from the seam in which the tab is sewed on?

Q. Yes, whether it is placed in one edge or in the middle or near the seam. Does the thickness of the mattress have anything to do with that question? [256] A. Yes.

Q. (By the COURT.) The only real effect it would have would be to reduce the extension of your tab through the mattress, is it not? A. Yes.

Q. And nothing else? A. Exactly.

Q. In one case, if you had it real close to the

(Testimony of Robert L. Roberti.)

seam, you would have more cord through your mattress? A. Yes.

Q. And even though you had a thick mattress you might still do it with a very short tab, your idea being to have your tab extend through the mattress? A. Yes.

Q. And to keep it uniform? A. Yes.

Q. Is there any advantage in having a tab extend through the mattress, over the cord?

A. The tab in some kind of mattresses has a greater resistance of holding the filling from shifting than what the cord has.

Q. (By Mr. GRAHAM.) You mean that, the tab being of considerably more width than cord, it offers that much more resistance to the filling shifting? A. Yes.

Q. Now you spoke of the advantage of eyelets in [257] the case of renovating mattresses. Just what did you mean by that?

A. When a mattress becomes matted down and the filling needs renovating it is common procedure to make over a mattress, or to renovate it, to take the filling out and clean the filling and put it back in again.

Q. And in doing that, by means of the eyelets you not only have the exact place to put your needle, but you also know that the tabs are in proper place to be engaged for the purpose of making the ties again; is that correct? A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—That is all.

TESTIMONY OF AUGUST ROBERTI, FOR  
PLAINTIFFS (IN REBUTTAL).

[258] AUGUST ROBERTI, called as a witness on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. August Roberti.

Q. Are you one of the patentees of the patent in suit, Mr. Roberti?     A. I am.

Mr. GRAHAM.—For the purpose of clarifying the record I want to ask a question:

Q. Had you prior to the time this suit was brought transferred any interest in the patent?

A. I had not.

Q. Were you present in the courtroom and did you hear the testimony of Mr. Daniel?     A. I did.

Q. Is Mr. Daniel present in the courtroom?

A. Yes, sir.

Q. Mr. Daniel testified about showing you certain documents or models relating to a mattress. Will you please state fully what you know about that situation?

[259] A. I know nothing about it.

Q. Was Mr. Daniel employed by you?

A. He was.

Q. Did Mr. Daniel ever show you a so-called specification and blue-print of a mattress?



(Testimony of August Roberti.)

A. He never did.

Q. Did he show you a model?

A. He never did.

Q. Did he ever talk to you about any alleged invention that he had made?

A. He never did.

Q. I will ask you if you also heard the testimony of Mr. Fox of the Imperial Cotton Works relating to certain disclosures claimed to have been made or the showing of a mattress to Mr. Edward Roberti? A. Yes.

Q. Did you have any conversation with Mr. Fox regarding that matter? A. I did.

Q. When did that take place?

A. In the fore part of November in this last year.

Q. And what was the nature of that conversation and where did it take place?

A. Mr. Fox was at his home in Van Nuys, and I asked him if he could recall any mattress with [260] eyelets in that Mr. Avrill had produced while working in his employ. He said there was only one mattress that was produced to his knowledge in his plant and that was the one with eyelets for lacing the mattress down.

Q. But what did you understand by that?

A. That that mattress would have eyelets in, but was for the purpose of lacing the mattress down to a proper thickness with the lace and using it in that manner, so that the mattress could be pulled down to a laced form.

(Testimony of August Roberti.)

Q. And what was the occasion of that conversation? How did that happen to take place?

A. Previous to the calling of our case, which was to be, I believe, the 5th of December last, I intended to have Mr. Fox as a witness if necessary in the case, so I asked him in conversation if he could recall any mattress other than this one he mentioned, and he said no, there was no other mattress to his knowledge that was made in his place except the one with eyelets for lacing.

Q. Were you not directed by your attorney to get in touch with him? A. I was.

Q. Now will you please state fully all the circumstances that you can recall relating to the [261] making of this invention shown in the Roberti patent, starting with the earliest thought on the subject and continuing until the time of the completed mattress?

A. Well, my whole life's work has been in the mattress business, and I started in the mattress business when I was 14 years old, and my brother and I went into partnership in the business in 1901, or 1902, and I being the inside man in the factory and my brother the outside solicitor for business our whole attention was given to mattresses and to perfecting mattresses as we went along in the business. In running our business we always have done, up to the time we became quite large manufacturers, considerable repair work and had a chance to see and to solve the different methods in which mattresses have been made, and what could be done, and com-

(Testimony of August Roberti.)

ing in contact with this it was very easy for us to solve, if possible, a problem which of course had never been solved before, so as to make a mattress that was better than the one made before it, and in getting in repair mattresses from time to time now and then there would be one of these mattresses showing up for repair that was made with the inner ties, as a foreign-made mattress, such as Russian mattresses, which would be tied inside, and there were no strips, but only ties to tie the ticking down from the inside. [262] Well, we didn't think much about making an improvement of that kind, only it stuck in our minds until the time came, about 1912, when it became quite a rage in Los Angeles for each and every manufacturer to have something special in the way of a better mattress, and the Stockwell Company, being a competitor at that time, started to manufacture the never-stretch mattress, which took Los Angeles by storm and was all the rage, and of course it left us without anything as a main special mattress to feature; so from that time, from 1912 until we produced the "Sanotuf" mattress our mind was continually working on this mattress to produce a mattress which would be a never-stretch mattress and be better than the one that was already produced on the market. We claim that we have three redeeming features and special features on the "Sanotuf" mattress where other never-stretch mattresses only have one feature. The features are that the "Sanotuf" mattress is a sanitary mattress, disposing of

(Testimony of August Roberti.)

the outside tufts. That is the first feature. The next feature is to have the inside ties, doing away with the roughness on the outside of the mattress and to bring the mattress down to uniform thickness, without having an outside tie, and the only possible way to market this mattress and make it salable would be to have a finished article such as an [263] eyelet or some finished job which would pass the inspection of the best mattress users, and in trying to solve the problem of using shoes with eyelets in it came to our mind that eyelets would be the proper thing, because an eyelet in a mattress would not be a substance which would be felt by the body coming in contact with it, and also would furnish an opening to operate this inner tie and bring it down to uniform thickness. Then when my brother and I began to talk about the never-stretch we concluded to put the never-stretch strip across next to the eyelet so as to be able to operate through this strip. In that way the mattress, after making a few models and working at it evenings at home and in and out and at different times all along—as I say, anywhere from 1913 and 1914—and the longer we put off the production of this mattress the more we needed it as we needed a better mattress to put the feature in our line.

Q. And what did you call the first mattress that you made and sold like the mattress here in evidence, or like the "Sanotuf" mattress, Exhibit 9?

A. We had never given the mattress a thought as to name, the first ones we made, and we started out

(Testimony of August Roberti.)

with the name "Can't-stretch," as our competitors had a name "Never-Spread," and we thought a "Can't-Stretch" mattress would be a practical name to use, although [264] it was not a very desirable name, until we got the "Sanotuf" mattress. The "Sanotuf" name was really originated by my brother. He came to me with the name "Sanotuf" and asked me what I thought of the "Sanotuf" name instead of "Can't-Stretch," and after solving the meaning of "Sanotuf," it meant a sanitary tufted mattress, therefore we thought that would be the proper name to give the mattress and that it would fit the construction of the mattress better than any name we had ever thought of.

Q. How were the eyelets put in the first "Sanotuf" mattress?

A. When we first thought of the eyelets we talked it over and I said "I will try the eyelets, and I will purchase a machine, if possible"; so I visited the wholesale finding companies, and of course they sold shoe findings and that was the place to go for an eyelet machine, and I purchased a hand machine, which was the only one I could get, and some eyelets, and then we started to make our models and work out the eyelets and place the position of the eyelets to where the inner construction could be operated from.

Q. Can you fix the time when the first "Sanotuf" mattress was sold?

A. According to our records it was along about [265] the latter part of October, 1914.

(Testimony of August Roberti.)

Q. And had you made any complete mattresses prior to the time you sold this one?

A. If any, a few, prior to that time. That is, just samples.

Q. Since that time have you continued to make mattresses, and up to the present time?

A. We didn't have much production until we had ordered a large machine whereby the eyeletting could be done in an economical way so as to enable us to make the mattress at a price whereby it could be sold.

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. How long was Mr. William Daniel in the employ of Roberti Brothers?

A. I believe two or three years. I couldn't say exactly.

Q. What period of time did that employment cover?

A. I believe he came with us in about 1909 or 1910, and left, I think, some time in 1913, or in that vicinity of time.

Q. And you had a bookkeeper named Miss Ella [266] Green? A. Yes.

Q. How long was she with you?

A. Several years. I know she was there at that time, at the time Mr. Daniel was there.

Q. And the assistant bookkeeper's name was what?

(Testimony of August Roberti.)

A. I don't just recall her name, but I recall that we had an assistant there; I think her maiden name was Kaylor.

Q. And was Mr. Clark in your employ at the same time?

A. I couldn't say without referring to my records.

Q. You don't remember the shipping clerk?

A. I remember Mr. Clark, but I couldn't say whether he was there at the time that Mr. Daniel was there or not.

Q. You heard the testimony of your brother this morning, did you not?      A. I did.

Q. Do you remember his testimony that he could not remember who had made the final suggestion, whether you or he, as to this method of tying together mattresses to complete the method of performance in making the mattress? Have you any recollection *about*.

[267] A. I have some recollection of it, yes.

Q. What is your recollection?

A. I recollect that we had recalled seeing a mattress without a counter-sunk indentation for tufting, such as the Russian mattress, which had inner ties. Our only trouble then, when we figured on making a "Sanotuf" mattress, would be with the inner tie, but the next thing was to get at that inner tie after the mattress was filled ready for finishing. Then the idea came to put a permanent eyelet in to get at this inner tie to operate. Then we worked out the strip, which of course would necessarily have to

(Testimony of August Roberti.)

be there to keep the ticking from stretching in width.

Q. Who was it, you or your brother, first got this complete idea of running the needle with the twine through an eyelet in the top, through both tabs, through the other eyelet at the bottom, and back again through both tabs and out the first eyelet and then knotting and drawing the knot into the mattress?

A. Being a mattress-maker you would not have to even mention that, because you would know that in placing this eyelet there it would be there for the purpose of connecting with the needle to these tabs. That is the only reason it could be there, aside from the ventilation.

Q. As I understand you, you had never heard of [268] that method of tying together a mattress before you and your brother had worked it out; had you?

A. Well, we knew that any mattress that is stayed in any way would have to be anchored—the filling would have to be anchored in some way. The only way you could do would be to run your needle down through the mattress and to anchor your filling through this eyelet.

Q. Well, did anybody know that before you and your brother knew it, as far as you wish us to understand? A. I couldn't say.

Q. Didn't you consider that that was knowledge that was new on the part of yourself and your brother, that method of tying together a mattress?



(Testimony of August Roberti.)

A. I knew that the eyelet was— As soon as we discovered that the eyelet would give us a finished product, we knew then that we had something that was a *far* improvement over any mattress that had ever been produced.

Q. Did the thinking of the eyelet precede the thought of using the eyelet, or did the method of tying together the mattress precede the thought of using the eyelet?

A. The eyelet was the only obstacle as far as making the mattress is concerned. You see, that [269] enabled us to fill the mattress and also get at the inner operation of it after it was filled and sewed; therefore when we discovered the eyelet was the thing to use we knew then we had something that was absolutely what we needed to perfect our mattress to the last stage.

Q. Well, who was it took the step from the thought of the eyelet to the step of using the eyelet the way you use it to tie your mattress together?

A. When we first spoke of putting out this never-stretch mattress we started in—it came to our mind again of getting this mattress up along about the—previous to the time we invented it, and that was that we must have a mattress that is inner-tied and smooth and doing away with cotton tufts.

Q. You say you thought you must have such a mattress?

A. In order to have a better mattress than any mattress on the market we should have a mattress without an unsanitary device such as cotton tufts

(Testimony of August Roberti.)

and so forth, which has been a hindrance to the operation of mattresses ever since they were made, and they are unsanitary.

Q. Whose idea was it that you must have a mattress that did not have the little tufts?

A. That was both of our ideas. We both [270] consulted with each other, that if we made a mattress it must be better than any one that was made.

Q. Then proceeding from that point who was it that first worked out this idea of using the eyelets in the two ticks and running the twine through the two eyelets and the tabs and so forth so as to complete the mattress and drawing the mattress together?

A. Well, I first mentioned the idea of using the eyelets as a permanent opening, and there was nothing else to figure out after that excepting how large to make our tabs or strips, whichever we may stitch to, and that was done by our experimenting on the models.

Q. Then as far as the main idea of the invention is concerned do you wish us to understand that the occurrence to you or your brother, or one of you, of the use of an eyelet turned the trick completely and solved the problem and completed the invention?

A. No; that enabled us to finish our patent by using the eyelet as an operating and also a ventilating hole for the mattress, making a mattress that

(Testimony of August Roberti.)

you could conscientiously sell as a ventilating mattress.

Q. Then as I understand it the occurrence to you of the use of the eyelets carried you over the final obstacle; did it? That was the real point in [271] your development of this mattress—

A. No; the eyelet was the last feature that we thought of to perfect a mattress to make it the most salable article.

Q. When you had the eyelet, or the idea of using the eyelet, you had no further troubles in working out a solution of the mattress problem?

A. We had no important trouble, but just a little experimenting as to how and where we placed our tabs and how close together to put them and those little features that were, of course, in an experimental stage.

Q. Then in the position in which you and your brother found yourselves in solving this mattress problem, with the eyelet suggested to one of you the problem was solved; is that the way you wish us to understand the situation?

A. No; we discovered that was what we needed to perfect our mattress.

Q. And when one of you hit upon using the eyelet it was no trouble to go on and complete the idea, was it?

A. Then I went ahead and made my little model evenings; I would work on it at home in my own private sewing-room, experimenting at odd times on this inner construction.

(Testimony of August Roberti.)

[272] Q. You made these models, did you?

A. I made models at home; yes, sir.

Q. When did you make those models?

A. The first model I made, with the eyelet in it, at home, was in about the latter part of September, 1914.

Q. In what part of September did you say, again?

A. In the latter part of September, 1914.

Q. Did you do all the work on those models?

A. On the one I was working on at home. I worked on it in my private sewing-room at home.

Q. Did your brother make any models?

A. He was working on a method of construction at his home, which of course I had never visited at the time he was working on it, although we would talk of his working on these things—talk it over with me at the office.

Q. Well, to your knowledge did your brother make any models of this mattress?

A. Only the ones we worked out later together at the factory.

Q. These September models of 1914, did your brother make any of them?

A. No; that was done at my home.

Q. And did you start on those just as soon as [273] the use of the eyelet occurred to you?

A. Yes.

Q. And your brother didn't co-operate with you at home in working up these models?

A. We would always see each other every day at the office and talk over the business and regular

(Testimony of August Roberti.)

affairs going on in our business, and in that way we would consult one another regarding these features that we would have on this never-stretch mattress.

Q. Was the invention complete in the minds of yourself and your brother, as far as you understood his mind from his statements, when you commenced working upon these models in September?

Mr. GRAHAM.—That is calling for a conclusion of the witness, your Honor, on a question of law, which is for the Court to decide. The facts are before the Court.

The COURT.—He may answer.

A. I could answer that. We knew that making the mattress with the hand eyelet machine would make it so expensive that it would be almost impossible to market it. Then after making the first few mattresses with the hand eyelet machine and finding out that we could get a power machine which would make the work very rapid then we became encouraged to know that the mattress could be made at a marketable price.

[274] Q. In these models did you use metal eyelets or mere perforations in the ticks?

A. Shoe eyelets.

Q. Had you and your brother agreed that the invention was complete in your minds or worked out to solve the mattress problem you were considering when you first started on these models at home in September?

A. We were not convinced until we found that—

(Testimony of August Roberti.)

You know there are 120 eyelets in a mattress, and we knew that unless the eyelets could be placed in this mattress in a rapid manner it would be out of the question to manufacture the mattress at a salable price.

Q. Well, your working on these models didn't—

A. That is, with a hand machine and with a hand operator.

Q. Yes, but that didn't settle the question whether you could make them commercially or not, did it?

A. That settled that it was a good mattress, whether it could be made at a market price or not.

Q. And that you didn't determine until after October 1, did you?

A. When we ordered the power eyelet machine from the eyelet factory and the shoe machine factory we were convinced that by having a self-feeding eyelet [275] machine we could produce this mattress at a marketable price. Then we were convinced that we had something that we would be able to manufacture at a price at which we could continue to make it.

Q. Then, really, the whole kernel of this problem was the idea of using the eyelets and the question of whether you could commercially make the mattresses with the eyelets and put them in cheaply enough so that they would stay; is that it?

A. Yes; we knew we had a combination of ideas that would give us a very marketable product.

Q. Then with this problem before you the oc-

(Testimony of August Roberti.)

currence to you or your brother of the use of the eyelet solved the problem for you, did it not?

A. It helped to solve the problem, being able to make the mattress at a cost that would permit us to sell it.

Q. But these exhibit models have the tabs and cross-strips in?

A. We made the first models in different manners. In sewing these tickings I would take a piece of ticking home large enough to work with, probably 24 inches square, two pieces, and sew these strips—I remember the first model with the inner ticking I made at home was one that would have a strip running across the ticking, and then would drop down, a little drop [276] on this strip, to give us a little countersink, and then I would try it another way, by sewing a tab on in different ways, and finally after having these different ideas before us, with the eyelet right over this strip, we finally decided that the strip would be the only thing to give the mattress a countersunk tufting idea.

Q. And you put these cross-strips in the models in September?     A. Yes.

Q. And the tabs?     A. Yes, both ways.

Q. And the eyelets?     A. Both ways.

Q. And you drew the ticks together by a twine, using a needle passing through the eyelets of the tops?

A. The first samples that were made, they were just made in the inner construction of it, because

(Testimony of August Roberti.)

being mattress makers we could tell by the inside sewing just what would be the results after the mattress was made up, so that we didn't make up a little model mattress until probably along in October.

Q. But you had the idea of the invention all worked out in September?

A. It was worked out, but as to whether we could manufacture it and have it patented—spend the money [277] and have it patented—until we could find out whether we could make it on a paying basis.

Q. When, in your preliminary statement signed by yourself and your brother under oath, being part of Exhibit "F," dated the 8th day of February, 1917, you stated that you conceived of the invention with your brother on or about the first day of October, 1914, you had in mind the fact that your invention really was not completely shown in those models, didn't you?

A. You mean in our blue-prints?

Q. Yes. Well, when you made that oath between you you had in mind that the models didn't exhibit a complete embodiment of the invention, I presume (handing paper to witness).

Mr. BLAKESLEE.—That is a copy of Exhibit "F"; I think it is a true copy.

(Witness examining document.)

The WITNESS.—May I have the question again?



(Testimony of August Roberti.)

Q. (By Mr. BLAKESLEE.) I will restate it; When you made that statement under oath with your brother did you have in mind these models made in September, 1914?

A. I had no occasion to have them in mind.

Q. Well, when you said that the conception of the invention was completed on or about the first day [278] of October, 1914, did you have in mind this work you had done on the models the previous month?

A. There was no inquiry as to what we had done in the way of models, that I remember of.

Q. Well, don't you consider now, and didn't you consider at the time you made this affidavit, this preliminary statement under oath, that those models of September, 1914, exhibited your invention?

A. I didn't feel it was necessary to exhibit those.

Q. Well, now, as a matter of fact did those models exhibit the invention?

A. The mattress in our invention—we speak of the made-up or perfected mattress and not the models.

Q. Now, you stated in this preliminary statement that you first conceived the invention set forth in the declaration of interference on or about the first day of October, 1914. Now that you understood to mean that you first got this invention as a mental concept or mental picture. Wasn't that your idea of the matter when you made this affidavit?

A. Meaning by that that after working on this for some time we had finished our idea of the mat-

(Testimony of August Roberti.)

tress and solved all problems as to how it could be manufactured, then making a perfect mattress.

Q. Didn't you consider the invention as far as [279] the idea of using the ticks, cross-strips, tabs and eyelets and lacing together or drawing together the parts with twine,—didn't you consider that idea was complete in the minds of yourself and your brother at the time you made these models in September, 1914?

A. We didn't feel it was necessary to mention the models. We took it that the perfected mattress would be the necessary feature to produce.

Q. Well, please answer the question. Didn't you consider that those models exhibited the invention, as an invention, irrespective of its commercial form? A. They would.

Q. Were you asked at the time you prepared this preliminary statement whether you had made any models prior to October, 1914?

A. I don't remember.

Q. Did you state to the attorney who prepared this preliminary statement that you had made any such models? A. I don't remember.

Q. At the beginning of the business of marketing these "Sanotuf" mattresses, or at any time thereafter, did you omit the cross-strips from any of the mattresses? A. Not under our supervision.

Q. Do you know of any such instance?

[280] A. I can't recall making a mattress without the strips, but I can recall in experimenting on the cost of production by changing some little fea-

(Testimony of August Roberti.)

tures and locations of features in it, when we first began to manufacture, not getting away from the "Sanotuf" idea, however, in any way.

Q. Did you ever market any "Sanotuf" mattresses without tabs but using the cross-strips and sewing down through?

A. Without certainty, we may have experimented with the mattress in cutting down the expense of manufacturing by leaving a drop or a little slack in the stretch and catching to it; but that was done, if at all, after we had made the mattress this way, and we were still making them both ways at that time, just in an experimental stage.

Q. As a matter of fact don't you manufacture and supply the Eastern Outfitting Company of this city mattresses of the "Sanotuf" type without any tabs?

A. We have supplied the Eastern Outfitting Company with all kinds of mattresses off and on ever since we started in business, and I couldn't say without looking at our records whether the Eastern Outfitting Company had purchased any other "Sanotuf" construction mattress from us at any time without referring to records. That would mean on any one [281] that we had made in an experimental stage. But they all had eyelets in, exactly the same as the "Sanotuf."

Q. Well, haven't you supplied the mattresses commercially without the tabs?

A. On experimental stages at different times we have tried the mattress, working along with the

(Testimony of August Roberti.)

regulation "Sanotuf" mattresses. There was one time I can recall that I had our workroom make a few mattresses with the double sewing and the strip and the eyelet and leaving the tab off; but that was when it went right along through the works with the rest of the mattresses, and we found that after making possibly half a dozen mattresses that they were not as good as the original "Sanotuf."

Q. When was that done?

A. I don't recall, but it must have been from four to five years ago,

Q. You furnished some of those mattresses to the Eastern Outfitting Company, did you?

A. I couldn't say.

Q. If you did did it have the name "Sanotuf" mattress on? A. It would have our label.

Q. On the outside?

A. It would be labeled as a "Sanotuf" mattress.

Q. On the outside of the tick?

[282] A. Yes. Every "Sanotuf" mattress has a label.

Q. Did you ever put out any mattresses commercially with the "Sanotuf" name using just the tabs and not the cross-strips?

A. I can't recall it.

Mr. BLAKESLEE.—That is all.

Redirect Examination.

(By Mr. GRAHAM.)

Q. When you were first experimenting on this mattress with your brother, when the idea of an eyelet was first discussed, did you discuss any other

(Testimony of August Roberti.)

kind of an eyelet? Do you recall any other form of eyelet?

A. We discussed some opening which would form an operating hole, also a ventilating hole, and at different times we tried to figure out how we could place some kind of an opening at this tufting place, until I conceived the idea of the shoe eyelet.

Q. Did anyone in your place of business besides yourself and your brother work on these experimental pieces of ticking and models as you call them?

A. We have a forelady in our sewing room ever since we have operated to a large extent, and she would as a rule do this experimental work for us instead of giving it to one of the other seamstresses, [283] and there is a lady by the name of Louise Burrige, who was our forelady at that time, who did some sewing on those things for us.

Q. Did she do that under the direction of yourself or your brother? A. Both of us.

Mr. GRAHAM.—I think that is all.

Mr. BLAKESLEE.—That is all.

#### TESTIMONY OF LOUISE BURRIDGE, FOR PLAINTIFFS (IN REBUTTAL).

[284] LOUISE BURRIDGE, called as a witness on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

(Testimony of Louise Burrridge.)

A. Louise Burrridge.

Q. Were you ever employed by the firm of Roberti Brothers? A. I was.

Q. In what capacity?

A. Well, as their seamstress and forelady, both.

Q. What was the time in which you were employed there? A. From 1909 to 1914.

Q. And are you employed there at the present time? A. Yes.

Q. You say from 1909 to 1914?

A. Yes; August, 1914, I left there. I beg pardon, I meant 1915.

Q. During that time, from 1911 to 1915, what was the nature of your employment?

[285] A. Well, when I first went there I sewed. I was just sewing, making mattresses. And when I left there I had charge of the department.

Q. Are you familiar with what is called the "Sanotuf" mattress? A. Yes.

Q. You have done a lot of work on that kind of mattress, have you? A. Yes.

Q. Do you recall the circumstances connected with the first manufacture of those mattresses, or prior to that time?

A. Well, I remember we had quite a little excitement about it. Everybody was thinking about getting up a never-stretch mattress, and it was much talked of at that time, and I remember when Mr. August came in first and had me make up some samples on this order.

Q. Now, will you describe what this work was

(Testimony of Louise Burridge.)

that you did at that time? Just the actual work. What was it?

A. Well, he had me cut it a certain size, and then I sat down to one of the machines and sewed the strips across and put the tabs on.

Q. Did you ever have any directions from anyone else about that work?

[286] A. Mr. Ed. and Mr. August both came at different times, and we changed it—sometimes we made the tabs—when we found the tabs didn't work, as long as we had them, we changed them. They stretched. They would discuss it over my head while I was sewing and we would often change it.

Q. Both Mr. August and Mr. Edward discussed the matter in your presence? A. Yes.

Q. As to different ways of making the parts of the mattress; is that correct? A. Yes.

Q. And have you any way of fixing the time when that work took place?

A. No, I have not.

Q. Well, in what part of the year 1915 did you leave the firm?

A. I left there in August. I remember that I went to the World's Fair.

Q. In 1915 in August? A. Yes.

Q. When you left there what kind of machinery were they using for making these mattresses?

A. You mean to put the eyelets in or—

Q. Well, whatever you recollect.

A. We put the strips on and the tabs on with

(Testimony of Louise Burridge.)

the [287] Singer machine and finished it up when we put the eyelets in with the foot-power machine.

Q. How long, if you recall, did they have this foot-power machine before you left?

A. Well, we had it a number of months, I know, because we were turning out a good many of the beds. I remember we had three girls working on them all the time.

Q. And prior to the time when they used the foot-power machine for putting the eyelets in how did they put them in?

A. Well, I remember the little hand-punch we had.

Q. And do you remember how long they used that? A. No, I do not.

Q. Was it some time?

A. I don't remember that.

Mr. GRAHAM.—That is all.

#### Cross-examination.

(By Mr. BLAKESLEE.)

Q. Do you definitely remember any act in connection with this mattress with the eyelets prior to the first of 1915?

A. I can only remember that we were making them a good many months, but I have no way of fixing any [288] date in my mind at that time.

Q. Did you work on all of the mattresses of that type that were turned out during the first few months?



(Testimony of Louise Burridge.)

A. No; I only made the samples at first. After that others did it under my direction.

Q. Did you observe them as they were turned out? A. I did.

Q. Practically all of them?

A. Yes. It was my business to see that they went out.

Q. You inspected them?

A. I don't know that I took every one in my hands and inspected them, but I had to see that they went out in proper shape.

Q. Did you inspect the interior construction and the way the mattresses were tied together?

A. No; after they left my room I had nothing to do with them.

Q. Well, was that work done in your room?

A. In the tying down of the mattress, that was done in the mattress room.

Q. Was the putting of the tabs and cross-strips in done in your room? A. Yes.

Q. Were the cross-strips omitted from some of [289] those mattresses?

A. Not to my knowledge.

Q. Were the tabs omitted?

A. No. I never remember making any up with loops as described. We might have done it, but I can't recall anything.

Q. You can't recall any in which the eyelets, tabs and cross-strips were omitted?

A. I don't remember doing that. We made them in different ways at different times, but I don't

(Testimony of Louise Burridge.)

remember that. I just remember putting the tabs on and working it out in that way.

Q. You got most of your directions from Mr. August Roberti, did you not?

A. Well, Mr. August was the inside man; but when Mr. Ed. came in he came up and discussed it with me often.

Q. Which did you get your first instructions from as to what was desired of you to be made or what was to be done?

A. I got it from Mr. August, so far as I can remember. Mr. Ed., I think, would have told him to tell me if he wanted it done.

Q. But you got your instructions as to how to make this mattress from Mr. August Roberti to begin with?

[290] A. As far as I remember I did.

Mr. BLAKESLEE.—That is all.

The WITNESS.—I usually took all my instructions from him.

Q. (By Mr. GRAHAM.) But you did have many suggestions from Mr. Edward Roberti, and they also both talked it over and made suggestions together in your presence, did they not?

A. Yes.

Mr. GRAHAM.—That is all. I wish to offer in evidence a certified copy of the interference proceedings involving Interference No. 41,009 between Joseph Avrill and the Roberti brothers. I am *offer-* this because it is complete. The preliminary statements have gone in, but this shows

(Testimony of L. C. Alexander.)

the disposition of the interference by the Patent Office and the awarding of priority to the Roberti brothers.

(Plaintiffs' Exhibit No. 10.)

Mr. GRAHAM.—We rest.

TESTIMONY OF L. C. ALEXANDER, FOR  
DEFENDANTS (IN SURREBUTTAL).

[291] L. C. ALEXANDER, called as a witness on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. L. C. Alexander.

Q. Where do you reside?

A. 936 West 37th Street, Los Angeles.

Q. What is your occupation?

A. Salesman.

Q. Were you ever associated with the Imperial Cotton Works?     A. Yes, I was.

Q. Where?

A. First at San Julian Street; that was back in 1912; and we moved from there over to Sixteenth and Hooper Avenue.

Q. Were you present in court yesterday?

A. I should judge for half an hour.

Q. While you were present was one Mr. Avrill on the stand?     A. He was not; no, sir.

Q. Do you know a Mr. Avrill?

(Testimony of L. C. Alexander.)

[292] A. Yes, sir, I do.

Q. Was Mr. Avrill ever connected with the Imperial Cotton Works?

A. He was connected as superintendent or foreman at that time.

Q. Who owned the Imperial Cotton Works at that time, do you know?

A. Why, I think it was a corporation. Mr. Edward Fox was the head of it.

Q. And what was the business of the Imperial Cotton Works?

A. Making mattresses and comforters.

Q. And what was your position with that company?

A. I had charge of the comfort department and the stock, stock clerk, at times, and at other times I was in the mattress department.

Q. Now, at the Imperial Cotton Works did they have a showroom? A. Yes, sir, they did.

Q. And did they have an office? A. Yes, sir.

Q. Now, where was the showroom with relation to the office?

A. They were both in the same room. I should judge it was a room about this size or nearly this size.

[293] Q. And do you know a Mr. Edward Roberti and a Mr. August Roberti?

A. I know them by sight.

Q. Are they present in court?

A. They are; yes, sir.

Q. Now during the time you were with the Im-

(Testimony of L. C. Alexander.)

perial Cotton Works do you know of your own knowledge whether you ever saw Mr. Edward Roberti at said cotton works?

A. Yes, sir, I have.

Q. Approximately how many times?

A. I should judge I have seen them in there in the neighborhood of eight or ten times.

Q. Did you have any conversation with him?

A. No, sir, not to my knowledge.

Q. Do you recall of your own knowledge whether you ever saw Mr. Fox have any conversation with Mr. Ed Roberti? A. Yes, sir, I have.

Q. Did you ever see Mr. August Roberti at the Imperial Cotton Works?

A. Not to my knowledge.

Q. Do you know of your own knowledge whether Mr. Avrill ever invented any mattress while at the Imperial Cotton Works?

Mr. GRAHAM.—I object to that as calling for a conclusion of the witness, as to whether he invented a [294] mattress. If Avrill got up a mattress and this witness knows about it, let him describe the mattress.

The COURT.—He may answer whether he knows of his working on any invention of his.

A. Yes, sir, he was working on a mattress.

Q. (By Mr. BROWN.) What was that mattress?

A. At first he worked on a mattress with an eyelet with a silk cord through the eyelet—a laced mattress he called it. He made quite a number

(Testimony of L. C. Alexander.)

of them, and then he changed that later on and put a strip under those eyelets to reinforce those eyelets across that mattress.

Q. And where were the eyelets?

A. They were both in the upper and lower tick.

Q. Where was that mattress placed?

A. That mattress was first placed in what you might call a shelving in the workroom where we kept a lot of stock, and afterwards it was taken into the office, into what we call the showroom.

Q. Now during the visits you have mentioned in which you saw Mr. Ed Roberti did you ever see him looking at that mattress?

A. I saw him looking at that mattress. Mr. Fox brought him out from the office, and that mattress was lying on the side over from his desk, and I saw Mr. Edward Roberti look at the mattress at the [295] solicitation of Mr. Fox. Why my attention was called to it was the fact that Mr. Avrill and I were over at the other side, near a small machine of comforters, and Mr. Avrill cursed Mr. Fox for disclosing that mattress to Mr. Roberti.

Q. Did you hear any of the conversation or what took place at that disclosure? A. I did not.

Q. How close were you to Mr. Fox and Mr. Roberti at that time?

A. Well, I should judge in the neighborhood of 40 feet. It was in a room probably—the dimensions must have been 150 by 100.

Q. Now did you see Mr. Edward Roberti on any other occasion examining that mattress?

(Testimony of L. C. Alexander.)

A. I did not.

Q. Did Mr. Edward Roberti examine the mattress on that occasion?

A. He took hold of it just the same as a mattress-man would look it over.

Mr. BROWN.—That is all.

[296] Cross-examination.

(By Mr. GRAHAM.)

Q. Where was this mattress that you say Mr. Avrill made first placed after it was completed?

A. At the side of his desk.

Q. Where was his desk located?

A. In the workroom.

Q. Well, where in the workroom?

A. Right at the side of the door as you come out of the office.

Q. Which room was it that you said was about as large as this room? A. That was the office.

Q. The office was as large as this room?

A. It contained the showroom and stock of ticking.

Q. Now where was the shelving where you say this mattress was first placed?

A. It was first placed in the workroom.

Q. You said it was placed on some shelving, did you not?

A. We had shelving to stack our mattresses in.

Q. Where was the shelving?

A. Right outside of the office door, where you came out of the office. There were fireproof doors there between those rooms.

(Testimony of L. C. Alexander.)

[297] Q. Now what was the office like—were there desks in it?

A. They had a rack for mattresses; tables for stacking bolts of ticking on, and comforter cases to put comforters in.

Q. Did you have a stockroom?

A. That was the stockroom, combined.

Q. The office was a stockroom?

A. Office, showroom and stockroom.

Q. All three in one, combined? A. Yes, sir.

Q. Now where was the sewing-machine you refer to?

A. That was on the other side of the workroom.

Q. How big was the workroom?

A. I should judge it was 150 by 100. This was the mattress-room too, you might say and contained a scroll-room too where we scrolled the comforters.

Q. Now you say the sewing-machine was on the other side of the workroom and the workroom was 150 feet. Is that correct?

A. Or along there. Well, it was about 100 wide, and this was the short width.

Q. Where was the door from the office to the workroom located?

A. You might say they were—the only thing that [298] separated them was just the corner. One office door here, and right around here was the other.

Q. Now where was the sewing-machine with relation to that door?

A. It was just opposite, on the other side of the room.



(Testimony of L. C. Alexander.)

Q. At least 100 feet away?

A. No, it wasn't.

Q. You said the room was 100 feet across.

A. But those machines were not up against the wall. That machine had a space of 12 feet wide.

Q. And how near to the wall was it?

A. It was probably six feet from the wall.

Q. And you and Mr. Avrill were at that machine?

A. We were on this side of that machine, yes.

Q. Where was the mattress when you testified Mr. Roberti saw it?

A. It was just as you come in the door into the workroom. Right opposite there was a little desk, like, nailed up against the wall for Mr. Avrill, and right opposite that—that desk was not over four feet long, and separated those wooden bins you might say.

Q. What else was on those shelves?

A. Other mattresses.

Q. Quite a number of mattresses there, were [299] there not?

A. Well, I suppose those two tiers of mattresses would probably hold 150 mattresses in there.

Q. I see. And those shelves were filled with mattresses. Then you were at least 80 feet away from where you say Mr. Roberti was looking at the mattress; is that correct?

A. No; I should judge in the neighborhood of 70.

Q. Do you mean to say that at a distance of 70 feet you could tell which mattress he was looking at?

A. Yes, because this bin or section in this con-

(Testimony of L. C. Alexander.)

struction that had the old mattress in, the finished product, was the only one in there.

Q. You just said a few minutes ago that the shelving where this mattress was was filled with mattresses.

A. No; those shelves were to hold finished product, to keep them off the floor. There was a top and bottom and middle tier. The bottom tier probably was as high as that—

Q. Then you make that statement from the conclusion that because he pulled out a mattress where this mattress of Mr. Avrill's usually was, that it was Mr. Avrill's mattress; is that correct?

A. I didn't get that.

(Last question read.)

[300] A. There is no conclusion about it. I am positive of it.

Q. How do you know it?

A. Because the mattress was there, and I saw Mr. Fox show it to Mr. Roberti.

Q. Well, you were seventy or eighty feet away, were you not?

A. Well, we kept that mattress there.

Q. Did you go over and look at the mattress to know it was his mattress?

A. I knew it was Mr. Avrill's mattress.

Q. How did you know it?

A. Because I had worked on it.

Q. You don't know that that was the particular mattress Mr. Fox showed Mr. Roberti, do you?

A. Yes, sir, I do.

(Testimony of L. C. Alexander.)

Q. How do you know it?

A. Because it was the only mattress in that bin.

Q. Well, because it was the only mattress in that bin is the reason you say it was Mr. Avrill's mattress that Mr. Fox showed to Mr. Roberti?

A. I don't know whether Avrill claimed the ownership, but that was the one he and I worked on, and it was the only one in that bin that was shown to Mr. Roberti.

Q. Well, that is the only reason you say it was [301] that mattress, is it not, because it was the only one in the bin?

A. It was the only one of that construction in that bin.

Q. There might have been some other mattresses there temporarily and Mr. Avrill's might have been somewhere else?

A. I know it because it was taken from that bin. It was put in there, and we very seldom kept anything in that one bin.

Q. Now this bin you speak of was not in the showroom, was it?     A. No.

Q. It was in the workroom?

A. It was in the workroom.

Q. Did you ever see that mattress anywhere else?

A. It was taken in afterwards with the other samples into the showroom.

Q. How long was it in that workroom?

A. It probably lay there three days at the most.

Q. When was that, if you can recall?

(Testimony of L. C. Alexander.)

A. Well, I think that was in the latter part of 1914 or early in 1915.

Q. Are you positive it was in 1914?

A. I wouldn't be exactly positive, just around the exact dates, but I know it was before the Imperial [302] Cotton Works failed.

Q. When did that company fail? Did you leave there at that time?

A. I did. That was in the early part of 1915 I know.

Q. But you don't recall when?

A. No, I don't know the exact date of their failure.

Q. Was it in February?

A. I couldn't say it was in February, or March, but it was early—some time about that.

Q. Were you ever at the business place of Roberti Brothers?

A. Not to my knowledge. I might have gone over there once or so to deliver a message over there, or a piece of goods, or something like that.

Q. Did you ever talk to anybody about mattresses while you were there—or with anyone from Roberti Brothers?

A. Not to my knowledge. Not at that time.

Q. Didn't you know at that time that Roberti Brothers had a mattress that was different from the old style? A. No.

Q. Are you positive of that?

A. I am positive of it.

(Testimony of L. C. Alexander.)

[303] Q. You never talked to any person about it? A. No.

Q. You talked with Mr. Avrill about his mattress, didn't you?

A. Well, I didn't even know about what he was driving at at that time when he was putting the construction of that strip in there with the eyelets.

Q. Do you know what the construction was?

A. Well, all I knew, he put a strip there; I thought it was to reinforce those eyelets.

Q. Now what was the construction of that mattress you say you saw on the shelf?

A. It just had eyelets in. We had been making eyelets there for a year and a half to my knowledge, and over at the old San Julian place we used the eyelets in comforters to make a self-ventilating comforter. That was back in 1912 and 1913 or 1914, we made the eyelet mattress with a lace cord through it.

Q. When did you stop making that mattress with the lace cord through it?

A. We never did stop. It was just a question of demand that stopped them.

Q. Well, whose idea was that?

A. That was Mr. Avrill's.

Q. Now when was this mattress made that you [304] have referred to as being Mr. Avrill's, that you had on the shelf?

A. It was in the latter part of 1914 or early in 1915, just before they failed. That is the only one I remember of putting in that strip.

(Testimony of L. C. Alexander.)

Q. Well, how else was it made?

A. Well, except that instead of interlacing the cord through the eyelets he made ties similar to the inner tuft. The inner tuft would be just taking the regular mattress knot, the same as you would over a tuft, but eliminating the tuft and letting the knot drop within the eyelets so that it would be inside.

Q. Now, was that made in December of 1914 or in January of 1915 or February of 1915?

A. To be exact, I couldn't swear.

Q. You have no way of saying?

A. I know it was just before they failed, and I never knew what became of the mattress.

Q. How did you know it was Mr. Roberti that was talking with Mr. Fox?

A. Because he came in there a number of times, and I think one time I took a piece of goods over to his factory.

Q. Did you ever talk to Mr. Roberti? A. No.

[305] Q. Were you ever introduced to him?

A. No; I just knew him by sight, just the same as to-day, just from seeing him. In fact, most employees don't come in contact with the employers of other concerns, although we may know them by sight.

Q. Well, did you know at that time it was Mr. Roberti? A. Just through Mr. Fox.

Q. Which Mr. Roberti was that?

A. It was Mr. Ed Roberti, the gentleman on your right.

(Testimony of L. C. Alexander.)

Q. Prior to coming to testify here to-day who have you talked to with relation to these matters?

A. Why, I have talked this "Sanotuf" mattress for the last six years anyway.

Q. Well, I mean with respect to testifying in this case? Did you talk to Mr. Avrill?

A. Yes, sir. I have known Mr. Avrill for years.

Q. You went over the circumstances with him, did you? A. No, sir, I did not.

Q. You didn't talk anything about the circumstances? A. Talked about the case, yes.

Q. You didn't talk anything about this [306] conversation that you had with Mr. Avrill at the sewing machine? A. No, sir.

Q. You didn't talk anything about Mr. Roberti being in the factory of the Imperial Cotton Works?

A. No, I don't think it was ever mentioned.

Q. None of that was mentioned until you were on the stand; is that correct?

A. No, not through Mr. Avrill.

Mr. GRAHAM.—That is all.

Q. (By Mr. BROWN.) When did I first ask you to become a witness, Mr. Alexander?

A. This morning here when I first came in.

Q. And did I have any conversation with you as to testifying? A. No, sir.

Mr. BROWN.—That is all.

Q. (By Mr. GRAHAM.) Are you in the business of manufacturing or selling mattresses?

A. Not to-day; no, sir.

(Testimony of L. C. Alexander.)

Q. You are not interested in the manufacture or sale of mattresses?

A. No, sir, I am not connected with any mattress firm. In fact in the last two years I have been in the real estate business.

Mr. GRAHAM.—That is all.

TESTIMONY OF JOHN SCANLON, FOR DEFENDANTS (RECALLED IN SURREBUTTAL).

[307] JOHN SCANLON, recalled on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Mr. Scanlon, while you were associated with the firm of Roberti Brothers did they put out more than one form of "Sanotuf" mattress?

A. Well, when the mattress was first made they didn't call it "Sanotuf," and before very many were made, we made a few of them that were put out, but of course they were not satisfactory for three or four weeks after they started to make them.

Q. In what way were they not satisfactory?

A. Well, I will tell you. The trouble of it was the eyelets staying in—they had a large eyelet at that time for a while. They had experimented with different eyelets. They had a blue eyelet, and black ones, and different kinds, and they were too large, and of course they eliminated that, and they made



(Testimony of John Scanlon.)

some—because I made the model of the small ones, and I made two or three of the large ones at that time, and of course the mattress-maker would put them on—I don't suppose he made over three or four dozen, and they made them without the strip. Of [308] course that idea was to eliminate labor. And the eyelets wouldn't hold on cheap ticking, because an eyelet wouldn't stay in cheap ticking, that kind of eyelets, because they would pull out, and you had to put a strip under there, and that would make your goods thicker and your eyelet would hold better.

Q. Were any mattresses made for distribution to the trade, do you know, of your own knowledge, that were without the cross-strips?

A. Yes, there was a few made. I will say about three or four dozen. They were not satisfactory, and then they had to eliminate that. Because I know the first ones I made didn't have the strips on them first and we had an awful time making them. It took some time to perfect them, because at that time we used the double-point needle and that wasn't satisfactory; we had to use the single-point, thereby making them quicker, and you take on a good heavy tick the eyelets will hold, but if you use a thin tick they will not hold as good.

Q. Now can you fix the year that the several dozen mattresses you have testified about that didn't have the cross-strips were put out?

A. Well, I know it was in 1914, the time they mention. Around that time. But I couldn't give

(Testimony of John Scanlon.)

any dates or anything like that, but it was in the [309] latter part of 1914. But before they sent out many of them they caught that. They didn't send out over three or four dozen I think. The name "Sanotuf" I don't think got out until about 1915.

Q. Now during the term of your employment did you know a Miss Burrige, who testified this morning? A. Yes.

Q. Was she there?

A. Oh, yes, she was there.

Q. Do you know of your own knowledge whether any mattresses were put out at that time that had the cross-strips without the tabs?

A. Well, I don't seem to remember that so well. It seems to me like we did too. We might have made a few, but I don't think there was many of them made. That wouldn't hold as good with the tab in there. You get a better bite with your tab if you put on the cross-strip.

Q. Did you do any experimenting on the "Sanotuf" mattress?

A. Well, in regard to the experimenting, that was making the little samples. I made most all of them. I didn't make, really, the first one or two of the big ones. At that time there wasn't much business and the mattress-makers, there were only a few there, and we worked on the rack off and on and [310] handled the other part too, and I know we had an awful time making them at that time, because it was a new thing, but after they got

(Testimony of John Scanlon.)

it down where they had the tab and strip and got the proper kind of eyelet and everything of course it went along all right.

Q. Are you familiar with all the experiments made?

A. Well, I am familiar with all the mattresses that were made, the large ones and small ones, at that time, and samples. Not the ones they worked on. Of course they worked on their little forms and things outside of what I did.

Q. Did you see those forms?

A. Yes, I saw some of them.

Q. Now do you recall what the first thing that you ever did in the making of the "Sanotuf" mattress was?

A. Well, the first ones that I recall were just when they got the little ones made there was an eyelet in it and a tab only. That was the first ones.

Q. And what was the second one?

A. Well, after we made the first few dozen, whatever it was, I don't know whether it was two or three or four dozen, we found out that on the cheap ticks the ticks would pull off and the eyelet wouldn't [311] hold good on account of the thickness of the material and we had to put that strip across. There were several features connected with that. It would make the eyelet hold more securely, and also take the stretch out. Well, ticking will not stretch, but of course the mattress will stretch. Anything tied down will stretch when it spreads out.

(Testimony of John Scanlon.)

Q. And what was the third thing that was done in the making of that?

A. Well, as far as the third thing is concerned, I don't know. The idea was to get it out on the market and sell it.

Q. As a mattress-maker I would like to ask you whether or not in your opinion the tabs being pulled down through the filling of the mattress prevents the shifting of the filling.

A. Prevents shifting?

Q. Yes.

A. Well, I will tell you. Referring to the filling of the mattress, the "Sanotuf" mattress, I made a statement here before, on both of those mattresses, that I never did regard them as being so much with the cheap filling. With a cheap filling they are not as good. If you have a good filling in them they are a good mattress to a certain extent, because they will hold up, but with the cheap fillings [312] in them, or inferior grades, they can't tie them down, because there is no body to them, and they will shift, in the cheaper material. In long staple cotton they are a good mattress in that way, but outside of the long staple cotton, and hair, and good grades of floss it is very inferior in some respects.

Q. Have you ever renovated any mattresses?

A. Yes.

Q. Have you ever renovated any "Sanotuf" mattresses? A. Yes, I have.

Q. How do you do it?

(Testimony of John Scanlon.)

A. Well, have the boys take them apart, and, as a rule, you can make them over—you can make them over, but we generally put tufts through them, because if we make them over for anybody else we just tuft them ordinarily, because sometimes the eyelets are out or the tabs are pulled off, and small shops can't make them over as readily as the large manufacturer can.

Q. Did you hear the testimony this morning of Mr. Edward Roberti and Mr. August Roberti when they were on the stand? A. Yes.

Q. As to making over the mattresses through the eyelets, being able to secure the cord?

[313] A. Yes, you can secure the cord again if they are not broken out—secure the tab—but if they are not sewed right, or if a stitch breaks in those tabs at any place the whole tab, as a rule, will pull loose, and in making the “Sanotuf” or any of those mattresses the stitchers as a rule—it is their own fault lots of times—stick the needle in the cord or thread, and if you cut one thread the whole tab will come out, and of course you have to fix that in again by—

Q. Now as to ventilation, as a mattress-maker and renovator would you say by beating that mattress, Plaintiffs' Exhibit 9, air would be drawn into the mattress and renovate or lift up the filling of the mattress so as to make it lighter?

A. Well, I suppose a certain amount of air is in it; but as far as ventilating the mattress is concerned, I don't see how air could pass through from

(Testimony of John Scanlon.)

one eyelet to another. I don't understand it. There is a certain amount of air spaces in there, probably, at certain times, but the air can't pass through a mattress.

Q. Now during the term of your employment with Roberti Brothers did you at any time work on a mattress which had an eyelet in both ticks and a lacing through the eyelets back and forth for drawing the [314] ticks together?

A. We never used any laces. That lacing idea, as I understand, they used to have two eyelets in it, and they would lace them. But they never do anything like that; in fact I don't know what—

Q. Now, who gave you your directions as to making these models of "Sanotuf" mattresses?

A. Well, of course the directions came through the proper channels. Mr. August. The only thing of it was, he had charge of the place and when the little forms or little samples were made, just about a couple of feet square, we would fill them—of course ordinarily with the best cotton, like white staple.

Q. You talked the matter over first with Mr. August Roberti?     A. Yes.

Q. You received your instructions from him, did you?     A. Yes.

Q. And did you with Mr. Edward Roberti?

A. Oh, yes. Well, we talked together there on different occasions.

Q. Who gave you your instructions as to making mattresses or how to make them?

(Testimony of John Scanlon.)

A. Well, I could see how they were made, that is, [315] as far as the construction was concerned, at that time. Of course, as I say, there were unnecessary things eliminated, such as placing your eyelet the right distance from the tab, and one thing and another.

Mr. BROWN.—That is all.

Q. (By Mr. GRAHAM.) What are these models you have referred to?

A. Little samples that they made to go out to different furniture stores.

Q. In other words, salesmen's samples?

A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BROWN.—That is all.

(A recess was thereupon taken until 2 o'clock P. M.)

[316] AFTERNOON SESSION—2 P. M.

The COURT.—Proceed, Gentlemen.

Mr. BROWN.—Mr. Malerstein.

TESTIMONY OF HARRY E. MALERSTEIN,  
FOR DEFENDANTS (RECALLED IN SUR-  
REBUTTAL.)

HARRY E. MALERSTEIN, recalled as a witness on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Mr. Malerstein, in your factory do you ever

(Testimony of Harry E. Malerstein.)

repair or renovate mattresses outside of manufacturing mattresses for the trade?

A. We sometimes do make over mattresses.

Q. Have you ever renovated a "Sanotuf" mattress? A. Yes, sir.

Q. Can you name any specific instance?

A. Yes; there was once a mattress was brought in from a store to be made over with a new tick, on account of being spread.

Q. Have you any such tick? A. Yes, sir.

Q. Will you produce it, please?

[317] A. It is here (producing same).

Q. Where did you get that tick from?

A. From a furniture store.

Q. Which one? Who, specifically?

A. It was the Eastern Outfitting Company.

Q. And did it come into your possession from them direct? A. Yes, sir.

Q. Did you receive it? A. Yes, sir.

Q. And what type of mattress is that?

A. This was a felt mattress of "Sanotuf" construction.

Mr. BROWN.—Do you admit that is a "Sanotuf"?

Mr. GRAHAM.—We admit it was a tick from one of our mattresses. Do you offer it in evidence at this time?

Mr. BROWN.—Yes.

Mr. GRAHAM.—We object to this as not being a complete mattress. If it is for the purpose of showing the spreading of the mattress I don't see



how it is material unless we have the whole mattress here. It is simply the covering of the mattress or the tick.

Mr. BROWN.—The purpose is not to show spreading, if the Court please, but is to show a variation [318] in the manufacture of “Sanotuf” mattresses.

Mr. GRAHAM.—And it is objected to as entirely immaterial whether the plaintiffs in this case ever made a different form of mattress or not. The question here is the patent in suit and whether the defendants infringed that patent. If the plaintiffs made other forms of mattress it is entirely immaterial.

Mr. BROWN.—If the Court please, this morning the testimony was to the effect that they had made other forms of mattresses and sold other forms.

The COURT.—Yes; there seems to be no dispute about that.

Mr. BROWN.—And we wish to introduce this particular tick for the reason that it shows a variation in the manufacture of “Sanotuf” mattresses.

The COURT.—It may be introduced although I suppose it is just cumulative with the statements that have been made before, they not denying that they have made a variety of them.

Mr. BLAKESLEE.—It may go as to the value of this alleged invention.

The COURT.—That would not necessarily prompt an inference to that effect because the expense of manufacture and various qualities and cheapness

(Testimony of Harry E. Malerstein.)  
might all enter into it and would bear explanation. We [319] can't necessarily assume because the different mattress is exhibited that they made that mattress because the other wasn't satisfactory. I will allow it to be introduced and you may argue the effect of it.

Mr. BROWN.—We wish to introduce this into evidence as Defendants' Exhibit "U."

Q. I wish that you would describe this particular mattress or tick and its construction as shown there in Exhibit "U."

Mr. GRAHAM.—That is objected to, your Honor. The mattress or tick speaks for itself. It is plain how it is constructed.

The COURT.—He can for the purpose of the record describe it.

A. According to the make of the "Sanotuf" it is supposed to have a tab in there which is allowed for the allowance of the tick. This tab is sewn close to the ticking which you necessarily would have to allow that much goods in that mattress just on account of the construction of the mattress. The pull is from the top and not the inside of this so therefore that mattress stretched during the time it was used. There was an allowance in this mattress as much as in a common mattress, This tab over here is sewn flat right on the tick and if there [320] would be no tab or strip at all it would be the same thing. The reason why a mattress does stretch is for the simple reason that there is an allowance in that tick for pulling down the tufts

(Testimony of Harry E. Malerstein.)

and the only way to overcome this and the only way to improve a mattress, aside from putting in a better filling there, which any manufacturer tries to do, is to get away from the stretching part of it. To get away from it the only thing is not to put any excess goods in that mattress. In this mattress it is plain to be seen that they have allowed goods in there and therefore it stretches.

Mr. GRAHAM.—I object to this whole line of testimony as being entirely immaterial and move to strike it out.

The COURT.—The motion will be denied and an exception taken.

Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. The fact that that tab, as you call it, is close to the tick, the amount of pull down or unevenness of the surface of the tick would be due, wouldn't it, to the length of the ties?

A. Well, in order to tie up a mattress you have [321] to pull it down as tight as the strings will pull themselves; otherwise it will not hold the filling inside in position.

Q. Then the ties do have the effect of holding the filling in a certain position, do they?

A. Yes, but you have to pull it down tight.

Q. Then the string ties do have the effect of holding the filling in a certain position?

A. Naturally.

(Testimony of Harry E. Malerstein.)

Q. Then the tabs of the Roberti mattress also have that effect to a greater extent, don't they?

A. Well, if they are hanging down loose inside they take up the slack, which in a common mattress would not be allowed.

Q. But if the ties will prevent the shifting of the filling, simply the string ties, then the tabs depending in the filling as made in the Roberti mattress will prevent a shifting to a greater extent than the strings, won't it?     A. Yes, it will.

Mr. GRAHAM.—That is all.

Mr. BROWN.—That is all. We have no further witnesses.

Mr. GRAHAM.—Now, about the argument, your Honor, it will take considerable time. I imagine it will take two or three hours at least.

[322] The COURT.—Well, I don't know that I have a long stretch of time here that I can pick out.

Mr. GRAHAM.—In fact, if we go into this case as I would like to go into it, and into the testimony, it would take longer than that for my argument.

Mr. BROWN.—Does the Court prefer briefs?

The COURT.—I would rather leave that to the preference of the counsel, or I will hear the argument and consider the matter later.

Mr. GRAHAM.—Judge Trippet, your Honor, in several cases that I have been connected with permitted briefs to be filed and then after he had considered the briefs he indicated any portions of the case that he desired to hear argument on. I

don't know whether such a plan would meet with your Honor's approval or not. In that way it seems to me that the Court would have the facts of the case and the law right before it and the points desired to be brought out could be discussed and the matter finally determined much more readily than otherwise.

The COURT.—You might do that and I will endeavor to leave some day aside, or a large part of a day, in the future after the briefs are in for the argument, as early as I can. All of next month will be the criminal month here and one half of the month following. What time do you want to file briefs in?

[323] Mr. GRAHAM.—Say ten days?

The COURT.—Is that enough on each side?

Mr. BROWN.—Oh, yes.

The COURT.—Suppose we make it ten, ten and five and I will keep it in mind and endeavor to hold its place and consult with you before I fix the time.

Mr. BROWN.—Of course in the argument on behalf of defendants we have set forth certain prior art which makes it a little difficult arguing prior art in a brief, but I shall attempt to do so.

The COURT.—As I say, I want to try to arrange the oral argument to suit the preferences of counsel.

Mr. BROWN.—An oral argument on the prior art would assist very materially. Then if this Court could indicate, as Mr. Graham has suggested,

as to certain things that the Court would like further argued, we will be very glad to argue those things, to clarify the issues.

The COURT.—I will leave it to you now to decide whether you want first an oral argument or a brief. If you can agree between yourselves I will find the time.

Mr. BROWN.—I believe that a little argument on the prior art would be in keeping at this time.

The COURT.—Mr. Blakeslee, are you preparing to argue the Layne & Bowler case on the 14th?

[324] Mr. BLAKESLEE.—I put that up to the defendants' counsel and ask them to notify your Honor's secretary and ourselves if that date would not be convenient and I have not heard a word from them. I will make it a point to call them up and inform your Honor's secretary about it.

The COURT.—I was going to say I can give you all of that day if that argument is not on, and that is next week.

Mr. BLAKESLEE.—I will inquire of counsel and phone your Honor's secretary. Did your Honor have in mind that if we didn't take that day in that case you would devote it to this case?

The COURT.—Yes; I can give you all of that day if that other argument is not ready.

Mr. BLAKESLEE.—My thought on this, while I sha'n't take part in the argument more than perhaps to say a word or two, is that it would be helpful to your Honor to have an outline of this

case to begin with, particularly on this prior art matter. Mr. Brown can lay the patents successively before your Honor and briefly point them out and that will be more convenient than briefing it, and then perhaps touch on one or two more things, and it seems to me it will curtail the briefing procedure considerably.

The COURT.—Suppose we set this down for the [325] 14th now and try to arrange some other time for the Layne & Bowler argument. That will be perhaps better.

Mr. BLAKESLEE.—Yes.

The COURT.—I will set it then for the 14th. I would rather put the argument over to that time than to hear it now because I will be nearer to the time I can work on it than I am now.

Mr. GRAHAM.—Then we will submit an oral argument at that time?

The COURT.—On the 14th, yes. I imagine you can displace the Layne & Bowler case without much inconvenience, can you not?

Mr. BLAKESLEE.—I think we can take it up on very short notice any time as soon as we can get all of counsel here.

The COURT.—Yes.

Mr. GRAHAM.—Your Honor, with respect to the unfair competition it is understood we are not pressing any claim against the use of the word “Tiednotuff” or of the word “Restmore.” And is your Honor going to hear an argument as to the joinder of those?

The COURT.—No, not if you are not pressing the claim, if that is understood, and is not relied upon.

(A recess was thereupon taken until February 14, 1924, at the hour of 10 o'clock A. M.)

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[Endorsed]: No. 4454. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Jonas, Doing Business Under the Firm Name of J. H. Jonas and Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, Appellants, vs. August Roberti, Jr., and Edward L. Roberti, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 2, 1925.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk. c.